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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LARRY HENRY CARTER, COURTNEY DEMARIS CARTER, and MAURICE LaBELLE,

PETITIONERS,

v.

BROADLAWNS MEDICAL CENTER, POLK COUNTY HOSPITAL TRUSTEES, DOUGLAS HART, JOHN AHERN, WILLIAM DYAR, CAROLE ROMINE, MARGARET STOUT, JEANNE MILLER, MILTON BROWN, CHARLES INGERSOLL, QUENTIN HUNTER, LLOYD KAUFMAN, PETER PINTUS, RAYMOND RUNKEL and IOWA INTERFAITH AGENCY FOR PEACE AND JUSTICE,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Scott Hartsook
315 East Fifth St., Suite 22
Des Moines, IA 50309
(515) 243-2151

COUNSEL FOR PETITIONERS

QUESTION PRESENTED

Whether the religion clauses of the First Amendment to the United States Constitution prohibit a public hospital, which is owned and controlled by the government, from spending taxpayers' monies to employ a chaplain to provide, prayer, sacraments, Bible-reading, religious counselling and other religious services to the hospital's patients and their families.

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v.

BROADLAWNS MEDICAL CENTER, et. al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Larry Henry Carter, Courtney Demaris Carter, and Maurice LaBelle respectfully petition for a writ of certiorari to review the decision in this case of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 857 F.2d 448 (8th Cir. 1988). The post-trial memorandum opinion of the district court (App. 63) is reported at 667 F.Supp. 1269 (S.D. Iowa 1987). The district court's order regarding post-trial motions (App. 50) is reported at 672 F.Supp. 1149 (S.D. Iowa 1987). The district court's order denying a preliminary injunction (App. 131) is not reported.

JURISDICTION

The judgment of the court of appeals was made and entered on September 13, 1988 (App. 170). Petitioners' Petition for Rehearing en banc was denied on November

2, 1988 (App. 172). The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides in pertinent part as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... U.S. Const. amend. I.

STATEMENT OF THE CASE

I. Statement Of Facts

Broadlawns Medical Center (BMC) is a county public hospital located in Polk County, Iowa. It is funded by tax monies raised from taxpayers of Polk County, Iowa

to serve the medical needs of Polk County residents. It is governed and controlled by a Board of Trustees elected by the voters of Polk County, Iowa pursuant to Iowa Code Chapter 347.

BMC first employed a chaplain in 1985 after the Board of Trustees had determined that BMC's volunteer chaplain program was inadequate. Defendant Charles Ingersoll, the Executive Director of BMC, testified that the purpose of hiring a chaplain was "to make religious services and support more available" to people at BMC. The job description for the chaplain requires the chaplain to be a member of the clergy who has a denominational endorsement and requires the chaplain to provide religious ministry, pastoral care and counselling to patients, patients' families and staff at

BMC. The chaplain is an actual employee of Broadlawns Medical Center who receives a salary of $23,000.

Chaplain Maggie Alzeno Rogers began her employment as BMC's chaplain in November of 1985. She graduated from the University of Dubuque Theological Seminary in 1984 and is endorsed by the United Church of Christ. She is eligible for ordination, but has chosen not to be ordained because she sees her calling as one of being a deaconess rather than a parish minister.

Chaplain Rogers makes religious services available at BMC by making calls and visits to patients and their families, whether or not they have requested to see a chaplain. She also conducts a Bible study group in lieu of a regular Sunday

service at Broadlawns West, a section of BMC devoted to long-term psychiatric patients. The purpose of the study group is to help people who are of the Christian faith embrace their faith tradition and to remember that God is with them.

The services provided by Chaplain Rogers include saying prayers, reading the Bible, providing religious counselling and interpretations, performing baptisms, sacraments and funerals, and providing any services of a religious or spiritual nature. If a patient visited by Chaplain Rogers does not ask her to say a prayer, she will normally ask if there is anything she can do for the patient. Approximately 40% of the time, the patient's response is to ask the chaplain to say a prayer. If Chaplain Rogers knows that prayer is mean-

ful to a person, she will ask them if she can say a prayer for them. During one visit, she taught a patient how to pray.

Chaplain Rogers encourages the BMC staff and the volunteer chaplains to let patients know that a chaplain is available. The staff and volunteer chaplains refer her to a patient if they believe that seeing a chaplain would be helpful to the patient, even though no request for a chaplain has been made by the patient.

The services provided by chaplain Rogers are available to all patients at BMC, including children, regardless of their income or their reasons for being at BMC for treatment. Her services are not billed directly to the patients, but are paid for out of general operating monies

under the control of BMC's Board of Trustees. Prior to the restrictions placed on her activities by the district court, all of Chaplain Rogers' services were available to the employees of BMC and to families of patients.

Prior to Chaplain Rogers' employment, BMC operated a volunteer chaplain program in which various ministers from Polk County, Iowa provided religious services on a voluntary basis. The volunteer chaplains were not employees of BMC and were neither paid by nor subject to the control of BMC. The volunteer chaplains responded to requests from patients for chaplains and generally made rounds of the hospital in case anyone wanted to see them.

Chaplain Rogers, who now supervises

the volunteer chaplain program, has changed the program so that the volunteer chaplains now focus on new admissions to the hospital. When the volunteer chaplains arrive at the hospital each morning, they visit all new patients in the medical section to offer their religious services, even though no request to see a chaplain has been made by the new patient.

Chaplain Rogers and most of the volunteer chaplains have had clinical pastoral education (C.P.E.), which is specialized training that prepares a minister to be an effective minister in a hospital or other institutional setting. C.P.E. condemns proselytization and requires a chaplain to help patients to find their own resources of faith. The education

does not provide any medical training and the chaplains do not perform any medical or psychiatric care of patients.

Chaplain Rogers takes her turn with the volunteer chaplains in conducting Sunday services in the Nauraine conference room at BMC, which room contains a wooden cross and various hymnals that are marked with a BMC stamp. The Sunday services are Christian services which include a brief worship service, singing, prayer, the reading of scripture, the chaplain's reflection on the scripture and a benediction. The presiding chaplain in charge of the Sunday service decides which scriptures to read. The Sunday service is announced over the intercom at the hospital and only those people who wish to attend the service do so.

BMC has approximately 200 inpatients at any one time, which includes approximately 75 adult psychiatric patients and 12 adolescent psychiatric patients. Approximately one-third of the psychiatric patients are involuntarily committed to BMC pursuant to judicial commitment proceedings in Polk County under Iowa Code Chapter 229.

BMC also serves prisoners from the Polk County jail when the prisoners need medical attention, although there are virtually no prisoners who stay overnight at BMC. If prisoners do need overnight medical care, there is a chaplain at the Polk County jail, paid for and supported by local churches and persons, who is willing to visit and provide religious services to them.

Prisoners and involuntarily committed persons may go to any of the religious affiliated hospitals in Des Moines if they have the financial resources to obtain care at those hospitals.

Petitioners Larry Henry Carter and Maurice LaBelle are taxpayers who live in Polk County, Iowa. Both are eligible to obtain medical services at BMC. In addition, Larry Carter and his daughter, petitioner Courtney Demaris Carter, are eligible to receive free or reduced cost medical care at BMC based on their income.

All three petitioners are publicly avowed Atheists who believe that they are entitled to have BMC, the public hospital in Des Moines, Polk County, Iowa, be free

from government-sponsored religious activity. The presence of a government-paid chaplain at BMC would offend them if they were at BMC. Dr. LaBelle believes that the employment of a chaplain by BMC indicates that BMC is supporting and sponsoring religion, while petitioner Larry Carter fears that he or his daughter will need to go to BMC for medical treatment and will have religious interference with their medical care because of the presence of a governmental paid chaplain. The presence of Chaplain Rogers or any other chaplain paid by the government deters all three petitioners from using BMC for their medical care.

II. PROCEEDINGS BELOW

Petitioners commenced this action in the United States District Court for the Southern District of Iowa pursuant to 42 U.S.C.§§1983 and 1985 and 28 U.S.C.§1343. The lawsuit challenges the constitutionality of the employment of a full-time chaplain at BMC, the chaplain's activities and other religious activities and artifacts at BMC. At the time this action was commenced, BMC's Board of Trustees had not yet employed Chaplain Rogers, but was merely considering the employment of a chaplain. When BMC's Board of Trustees refused to end their activities designed to employ a chaplain, petitioners commenced this action. The district court denied the issuance of a preliminary

injunction on September 9, 1985. (App. 168). BMC's Board of Trustees then proceeded to employ Chaplain Rogers who began her employment in November of 1985.

After more than four days of evidentiary hearings on the merits of this case, the district court, without a jury, issued its judgment on July 9, 1987. (App. 63). The court upheld the employment of a chaplain, but restricted the activities which she could perform. BMC and the other defendants filed a motion for a new trial and the district court issued its final order in this case on September 29, 1987. (App. 50). The district court found that "....The chaplain's position is not clearly secular. One of its main purposes is to meet the religious needs of patients." (App. 106-07). The district

court concluded that "Paying a chaplain to provide religious care (while not the chaplain's only duty) is an advancement of religion" and that the employment of the chaplain therefore violated the Establishment Clause of the First Amendment. (App. 108-09). The district court concluded, however, that the employment of a chaplain by BMC was permissible under the Free Exercise Clause where the services were provided to those persons who were not free to come and go and who were unable to freely exercise their religion while they were in the hospital. (App. 111-18). The district court upheld the employment of the chaplain under the Free Exercise Clause for the purpose of allowing the chaplain to provide religious services to BMC's

inpatients, oncology outpatients, the families of oncology outpatients, and the families of patients who were in life-or-death situations. (App. 121-22, 54-55). The district court enjoined BMC, however, from providing religious services to BMC's employees, outpatients other than oncology patients, and families of patients who were not in life-or-death situations. (App. 122-23). Based on the rationale of its decision, the district court also concluded that it was constitutional for BMC to permit religious services and artifacts in the Naurine conference room in the hospital and to provide reserved parking spaces close to the hospital for visiting ministers as a necessary incident to the provision for a chaplain. (App. 118).

The respondents filed a notice of appeal to the U. S. Court of Appeals for the Eighth Circuit on October 16, 1987, and petitioners filed a cross notice of appeal on October 27, 1987. The court of appeals issued its opinion and judgment was entered on September 13, 1988. (App. 170). After obtaining an order enlarging the time in which to file a petition for rehearing, petitioners filed a timely petition for rehearing and a suggestion for rehearing en banc on October 5, 1988. The petition for rehearing and rehearing en banc was denied on November 2, 1988. (App. 172).

After receiving full briefs and oral arguments from the parties in this case, a three judge panel of the court of appeals modified the decision of the

district court. The panel decision concluded that BMC's employment of a chaplain did not violate the Establishment Clause since the employment of the chaplain had neither the purpose or effect of advancing religion. Instead, the panel decided that employment of the chaplain had a secular purpose of enhancing the hospital's wholistic treatment approach. (App. 31). The panel also determined that the BMC chaplaincy is permissible under the Free Exercise Clause for those patients who are subject to restrictions on their movement attributable to the state by virtue of the fact that the patients were prisoners or had been involuntarily committed or by virtue of hospital rules in the psychiatric ward. (App. 41). The court concluded that the

district court was correct in upholding the employment of the chaplain, but that the district court's injunctive relief had to be modified so as to allow the chaplain to provide religious services to all inpatients and outpatients at BMC and to the families of all patients. (App. 42-43). The court also concluded that the chaplain could provide strictly secular services, as opposed to religious services, to the employees of BMC. (App. 44-45). The court also concluded that the religious artifacts maintained by BMC and the provision of parking spaces were permissible accouterments to the employment of a chaplain and the operation of the volunteer chaplain program. (App. 46-47).

REASONS FOR GRANTING THE PETITION

I. THE QUESTION OF WHETHER TAXPAYERS' MONIES MAY BE USED BY A PUBLIC HOSPITAL TO EMPLOY A CHAPLAIN TO PROVIDE RELIGIOUS SERVICES TO ITS PATIENTS AND THEIR FAMILIES PRESENTS IMPORTANT CONSTITUTIONAL ISSUES WHICH WILL AFFECT PUBLIC HOSPITALS AND PRISONS THROUGHOUT THE NATION.

This Court decided in *Engel v. Vitale*, 370 U.S. 421 (1962) and *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963), that taxpayer monies could not be used to require, promote or encourage Bible reading or the saying of prayers in the public schools of this nation. Since that time, the Court has steadfastly refused to allow encroachments on the Establishment Clause of the First Amendment to the United States

Constitution by those who would provide or advance religion in public schools. See e.g. *Edwards v. Aguillard*, 482 U.S. ____, 107 S. Ct. 2573 (1987). This Court's diligence in protecting the principles of the First Amendment has disallowed the expenditure of public funds for admittedly secular purposes if the expenditures had a principle and primary effect of advancing religion. *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985).

Due to the Court's diligent efforts in protecting the principles of the Establishment Clause, those who would use government monies to fund religious activity have now moved from the classroom to the hospital room. In this case, the court of appeals decided that taxpayers' monies can be used by government hospitals

to employ a chaplain to provide religious services. This Court should review that erroneous decision and take the opportunity provided by this case to rule that a public hospital may not employ a chaplain because the principles that prohibit the use of taxpayers' monies for religious purposes in public schools also apply to the use of taxpayers' monies in public hospitals.

The question presented in this case is not whether Broadlawns Medical Center (BMC), a governmentally owned and operated hospital in Polk County, Iowa, may permissibly allow its patients, families of patients and employees to voluntarily pray or engage in other religious activities while they are at BMC. The issue presented is not whether ministers, priests

or other religious leaders from the 200 churches in Polk County or from anywhere else may visit BMC and provide religious services to patients and their families. Finally, the issue in this case is not whether BMC may have a volunteer chaplain program, which it has had for numerous years, in which volunteer chaplains visit the hospital to call on those patients who have made actual requests to see a chaplain.

Instead, the important question presented in this case is whether BMC, a government hospital, may use taxpayers' monies to employ a chaplain to provide religious services to BMC's patients and their families.

Although the Court has enunciated the Establishment Clause and Free Exercise

Clause principles that make it clear that BMC cannot permissibly employ a chaplain to provide religious activities, the precise question presented in this case has never come before this Court, and has never been decided by any other court in this country other than in this case. The question presented in this case, however, is not uniquely limited to the facts of this case. Instead, the resolution of this important constitutional question will affect thousands of public hospitals and millions of patients and taxpayers throughout the nation.

The evidence in this specific case shows that there are approximately seventy public hospitals in the State of Iowa. In 1985, 2,291 of the nation's 6,986 hospitals were under government control, while

7,776,000 people were discharged from state and local hospitals. The average length of stay was 5.9 days. *U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States* 97 (1988). The evidence shows that many of this country's major metropolitan public hospitals have chaplains which are paid for by taxpayers' monies while many other public hospitals do not employ chaplains because of their belief that such employment is a violation of the Establishment Clause. (Joint Stipulation of Evidence). No county hospital in Iowa, other than BMC, employs a chaplain. A decision by the Court in this case would inform the bench, the bar, elected officials who govern public hospitals and taxpayers throughout the country whether

public hospitals have the constitutional right to spend taxpayers' monies to employ a chaplain to provide religious services. In addition, a decision by the Court that prohibits the employment of a public hospital chaplain would help to ensure that the Establishment Clause principles that have governed public schools will not be eroded.

The Court's resolution of the issues in this case would also inform public hospitals and prisons whether their patients and inmates can require them, because of the Free Exercise Clause, to spend taxpayers' monies to provide chaplains, thereby resolving a conflict that exists between the principles enunciated in this case by the Court of Appeals for the Eighth Circuit and the

principles enunciated by the Court and by the Court of Appeals for the Third and Sixth Circuits.

In this case, the court of appeals held that the Free Exercise Clause would allow Broadlawns Medical Center to hire a chaplain to provide services to those patients who were at BMC against their will, either as involuntarily committed persons or as prisoners of law enforcement agencies. (App. 40-41). Since the Establishment Clause prohibits BMC's employment of a chaplain, the court's decision is correct only if the Free Exercise Clause mandates the employment of a chaplain to ensure BMC's patients' Free Exercise Rights. If the Free Exercise Clause merely permitted, rather than mandated the employment of a chaplain, then

no conflict would exist between the Establishment Clause and the Free Exercise Clause, and the proscriptions of the Establishment Clause would take precedence and the chaplain's employment would be unconstitutional. *See Wallace v. Jaffree*, 472 U.S. 38, 81-84 (1985) (O'Connor, J., *concurring*); *O'Hair v. Andrus*, 613 F.2d. 931, 935 (D.C. Cir. 1979); *L. Tribe, American Constitutional Law*, 823-24 (1978).

The court's rationale that the Free Exercise Clause requires BMC and other hospitals and prisons to employ a chaplain to provide religious services to their patients and inmates conflicts with the Court's decisions in *Cruz v. Beto*, 405 U.S. 319 (1972) and *O'Lone v. Schabazz*, 482 U.S. ___, 107 S. Ct. 2400, (1987), and

with the decisions of the Courts of Appeals for the Third and Sixth Circuits in *Gittlemacker v. Prasse*, 428 F.2d 1 (3rd Cir. 1970), and *Thompson v. Commonwealth of Kentucky*, 712 F.2d 1078 (6th Cir. 1983). These cases demonstrate that the Free Exercise Clause does not require penal institutions, hospitals or other institutions which involuntarily hold people to provide chaplains by which inmates or patients can obtain religious services. The courts in these cases generally concluded that the fact of imprisonment is not coercion by the state in and of itself for purposes of the Free Exercise Clause, since the fact of confinement and the needs of the penal institutions impose limitations on constitutional rights. The fact that confinement

necessarily limits people's ability to exercise their religious beliefs in the manner that they prefer does not mean that the Free Exercise Clause gives inmates the right to have the prison actually provide religious services to them. *See O'Lone v. Schabazz*, 482 U.S. _____, 107 S. Ct. at 2405-06; *Lyng v. Northwest Indian Cemetary Protective Association*, 108 S. Ct. 1319, 1325-26 (1988). The Court of Appeals of the Third Circuit has stated,

> A requirement that a state interpose no unreasonable barriers to the free exercise of inmates religion cannot be equated with the suggestion that the state has an affirmative duty to provide, furnish or supply every inmate with a clergyman for religious services of his choice. It is one thing to provide facilities for worship and an opportunity for any clergy to visit the institution... but, to go further and suggest that the free exercise clause demands that the state not only furnish the opportunity to practice, but also

> supply the clergymen, is a conflict that dangerously approaches the jealousy, guarded frontiers of the Establishment Clause. *Gittlemacker v. Prassee*, 428 F.2d. at 4.

Under these cases, prison inmates have no Free Exercise rights to have prisons provide chaplains for them.

Even if the Court concludes that prisons may employ chaplains, there are numerous differences between prisons and hospitals which would counsel against allowing public hospitals to employ chaplains. Prisons have strict security requirements which make it difficult for inmates to obtain religious services. All of BMC's patients, however, have access to telephones that they may use to contact their religious leaders, and those leaders may visit anyone at BMC at anytime, except for those patients in a six-bed security

unit in the psychiatric ward at BMC. If a patient is physically unable to use a telephone, BMC staff will make calls for them. In addition, BMC serves the small geographical area of Polk County, Iowa and patients at BMC are not removed from their home community. This contrasts sharply with prisons, such as Iowa's state penitentiary, which often serve large geographical areas so that inmates are far removed from their own support groups. Therefore, a conclusion that prisons may employ chaplains does not necessarily mean that public hospitals may also employ chaplains.

Therefore, this case should be reviewed so that the conflict of these cases is resolved and public hospitals and prisons will know that their patients and inmates

cannot require the public institutions to spend taxpayers' monies to provide chaplains.

The question presented in this case is an important question of constitutional law under the First Amendment which has public importance throughout the nation. The Court, which has accorded special importance to the First Amendment, should decide this question by reviewing and correcting the court of appeals' decision.

II. THE COURT OF APPEALS' DECISION WHICH ALLOWS TAXPAYERS' MONIES TO BE USED TO EMPLOY A CHAPLAIN TO PROVIDE RELIGIOUS SERVICES AT A PUBLIC HOSPITAL IS NOT IN ACCORD WITH THE APPLICABLE PRINCIPLES OF THE FIRST AMENDMENT DECIDED BY THIS COURT.

A. The Chaplain's Secular Activities Cannot Be Used To Justify Her Religious Activities.

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... U.S. Const. amend. I.

A governmental action must have a clearly secular purpose in order to not violate the Establishment Clause of the First Amendment. *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). After a full evidentiary trial in this case, the district court found that BMC's employment of a chaplain does not serve a secular purpose since one of the chaplain's main purposes is "...to meet the religious needs of patients." (App. 106-07). The court of appeals, however, found that in addition to her religious activities, the

BMC chaplain served secular purposes such as grief counselling and other patient counselling. (App. 25-26). The court of appeals erroneously concluded that the employment of the chaplain does not violate the purpose prong of the *Lemon* test.

In allowing BMC's chaplain to perform religious activities, the court of appeals upheld the chaplain's religious activities, not because there is a secular purpose for the specific religious activities, but because she also engages in some type of secular activity. The court's reasoning, if allowed to stand, would allow teachers in public schools to lead their students in prayer and Bible readings if the same teachers also engaged in nonreligious activities such as the

teaching of English and history. This is clearly not the law.

In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) and *Engel v. Vitale*, 370 U.S. 421 (1962), the Court held that the Establishment Clause prohibits public school teachers from conducting Bible readings and from leading their students in voluntary non-denominational prayers. Since the public school teachers in *Schempp* and *Engel* also had secular teaching duties, these cases demonstrate that there must be a secular purpose for a specific activity in order for the activity to pass muster under the *Lemon* test. *See Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (government action entirely motivated by a purpose to advance religion is invalid).

The court of appeals mistakenly relied on *Lynch v. Donnelly*, 465 U.S. 668 (1984). In *Lynch*, a city erected a creche within a much larger display of secular Christmas artifacts. This Court held that one purpose of the creche was to provide the historical underpinnings of Christmas. The Court did not uphold the creche because of the fact that the other artifacts were secular. Instead, it upheld the creche because of a secular purpose that the creche itself provided. 465 U.S. at 680. In this case, there is no secular purpose for the prayer, Bible readings, and other religious services that BMC's chaplain performs. Therefore, the actual religious activities that she provides must be declared unconstitutional.

B. A Wholistic Approach To Medicine Is Not A Secular Purpose Which Authorizes BMC To Provide Religious Services.

The court of appeals justified the chaplain's religious services by concluding that BMC's "wholistic treatment approach to patient care..." was a valid secular purpose under the *Lemon* test. (App. 31). The court of appeals' conclusion is not in accord with decisions of this Court.

In *Abington v. Schempp*, 374 U.S. 203 (1963), the issue was whether voluntary Bible readings could be conducted in public schools. The Court stated that:

> [O]ur constitutional policy ... does not deny the value or necessity for religious training, teaching, or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree.

> For this reason the sphere of religious activity ... has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. 374 U.S. at 218-19, *quoting with approval Everson v. Board of Education*, 330 U.S. 1, 52 (1946) (Rutledge, J., *dissenting*) (emphasis added).

Schempp explicitly forbids governments from providing religious services, even if such services are deemed necessary to the well-being of people.

If religious services are necessary to provide wholistic medicine, then such medical care would necessarily be religious medical care and providing religious medical care would constitute a religious activity that would be invalid under the Establishment Clause. *See Abington v. Schempp*, 374 U.S. at 224 (government's purpose is religious when it is to be

accomplished through pervasively religious means); *Abington v. Schempp*, 374 U.S. at 179-80 (Brennen, J., *concurring*) (a government's purpose is religious if it can only be accomplished by religious means).

Schempp and the other school cases teach that while some people believe that a good education requires a religious oriented education, providing a religious education is not a secular purpose that can be performed by the government. *Grand Rapids v. Ball*, 473 U.S. 373, 382; *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976). Just as the necessity for religious training in order to have a good education does not provide a secular purpose that allows the government to provide a religious education, so

any necessity for religious services in order to have wholistic medical care does not provide a secular purpose that allows BMC to provide religious services. If religious services are necessary for good medical care, then they must be provided by the patient, the patient's family, and the patient's preferred religious organization. They cannot be supplied by the government.

Therefore, the court of appeals' conclusion that BMC's wholistic treatment approach is a secular purpose which justifies employment of a chaplain is erroneous. The Court should review this case and enunciate the correct principles of law that prohibit a public hospital from supporting religious activities.

C. Broadlawns Medical Center's Use Of Taxpayers' Monies To Employ A Hospital Chaplain Has The Effect Of Advancing Religion.

A government's action violates the Establishment Clause if any of its principal effects is to advance religion. *Lemon v. Kurtzman*, 403 U.S. at 612-13; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 783-84, fn. 39 (1973).

The district court concluded that paying a chaplain to provide religious services is an advancement of religion. (App. 108-09). The court of appeals' contrary conclusion that BMC's chaplain does not advance religion totally misapprehends established precedent of the Court.

In concluding that the BMC chaplain

does not advance religion, the court of appeals relied heavily on the district court's finding that Chaplain Roger's services to a patient depended on the patient's pre-existing preferences. The court stressed the fact that the purpose of the chaplain is to address the religious needs of the individual patient and that proselytization of the patient is totally inconsistent with the clinical pastoral education (CPE) concepts which presumably guide the chaplain's actions.[1] (App. 32-34). The court's decision is based on the extremely narrow standard that if the religious services provided

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[1] The district court found that "the fact that Chaplain Rogers abides by CPE concepts makes the advancement [of religion] more tolerable, but does not eradicate it." (App. 109).

are religiously "neutral" and there is no proselytization, then the services are permissible. This premise was rejected in *Engel v. Vitale*, 370 U.S. 421 (1962).

In *Engel*, the Court held that conducting voluntary prayer in public schools was a violation of the Establishment Clause. The fact that the prayers were voluntary or denominationally neutral furnished no defense to a claim of unconstitutionality under the Establishment Clause because that clause was violated by the mere fact of promoting religion, regardless of any compulsion. 370 U.S. at 430-31; *see also Abington v. Schempp*, 374 U.S. 203, 219-25. (1963) (Bible reading in public schools is invalid even though attendance at the Bible reading was voluntary); *Wallace v. Jaffree*, 472 U.S.

38, 60 fn. 51 (1985).

Under *Engel* and *Schempp*, the use of government funds to provide religious services in schools is impermissible, even though the services are neutral and voluntary. There is no reason why providing religious services in a hospital is less of an advancement of religion, especially when they are provided to suggestible psychiatric patients and to adults and children who are in a vulnerable medical state. Parents of children have an interest in having their children educated in a public school free of government sponsored religious activity. *Steele v. Van Buren Public School District*, 845 F.2d 1492, 1495 (8th Cir. 1988). In this case, the taxpayers have the right to receive medical care for themselves and their

children in a public hospital free of government sponsored religious activity.

If the government was allowed to provide religious services on an equal basis to all religions, then there would be nothing which would prohibit government grants to every religious denomination in order to enable the denominations to better practice their beliefs. Such actions, however, are the exact actions which are prohibited by the Establishment Clause, which prohibits the government from setting up a church, aiding one religion, aiding all religions, or prefering one religion over another. *Abington v. Schempp*, 374 U.S. at 216-19, *Grand Rapids v. Ball*, 473 U.S. at 381. Under a truly neutral religious policy, BMC would not provide religious services. They would

be provided by the patients' own religious leaders. *See Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980); *see also Bell v. Little Axe Independent School District*, 766 F.2d 1391, 1404 (10th Cir. 1985) (A religious practice, no matter how universal, inherently excludes those who believe in no religion).

Since *Everson v. Board of Education*, 330 U.S. 1, (1947), the Court has consistently held that no tax can be used to directly support religious activities, "whatever they may be called, or whatever form they may adopt, to teach or practice religion." *Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985). Tax monies in this case have been used to employ a religious person who is to provide religious services for the purpose of supporting patients and

their families in their religion. She was employed to meet their religious needs. The BMC chaplain, and the volunteer chaplains that she directs, make calls on inpatients and their families, whether or not such calls are requested. They are available to provide religious services such as prayers, Bible readings, sacraments, and religious discussions and counselling to anyone at BMC. The chaplain also conducts a Bible study group for long-term psychiatric patients to "help people who are of the Christian faith embrace their faith tradition and to remember that God is with them." There can be no greater advancement of religion since BMC, through its own activities and influence, is providing the means and opportunity by which its employees,

patients, and families of patients can obtain religious services. *Cf. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S.Ct. 2862, 2868-69 (1987).

The court of appeals tried to minimize the religious nature of the chaplain's activities by stating that she is only a counselor who has the versatility and training to help persons all along the continuum of religious dispositions. (App. 34-35). Although Chaplain Rogers engages in conversations with the various people at BMC in which religious subjects are not explicitly discussed, she introduces herself as the BMC chaplain and she wears a nametag that identifies her as the BMC chaplain. She stated that she is

never apart from her symbol as the chaplain, who is the symbol that there is a Higher Power.

Chaplain Rogers believes that it is part of a chaplain's role to discuss non-religious subjects with people and people do discuss things with her because they know the discussions are privileged since she is a chaplain. When directly asked by the district court whether she could renounce her title as chaplain and perform her duties as a social worker, she replied that her title was necessary so that people could move from non-religious to religious matters.

Therefore, the chaplain is not just a counselor. Even her secular discussions are inextricably intertwined with the symbol of her as a chaplain. The fact that

she may perform certain secular counselling activities does not mean that she is not at the same time performing her religious mission. *Cf. Grand Rapids v. Ball*, 473 U.S. at 384.

The court of appeals stated that BMC's employment of a chaplain does not create a symbolic tie between church and state since the chaplain provides religious services in a neutral manner. (App. 36). Neutral religion, however, is irrelevant to the Establishment Clause. The chaplain supports those to whom she ministers in their own religion and she provides religious services to them, as she is paid to do. Her prayers may be acceptable to the patient to whom they are given, but they are still prayers designed to support the patient's religious beliefs rather than

ceremonial or solemnizing prayers. She is, and is perceived to be, a religious leader.

In the school aid cases, the Court invalidated secular government aid to religious schools because of the appearance of a union between the government and religion. *Grand Rapids v. Ball*, 473 U.S. at 389. In this case, the appearance of a union of church and state is not deceiving since there is an actual union of the two, embodied in the chaplain, who is a religious employee of the government. This union places BMC's imprimatur on religion, thereby creating an impermissible effect of advancing religion. *Grand Rapids v. Ball*, 473 U.S. at 389-92.

D. Broadlawns Medical Center's Employment Of A Chaplain Causes Excessive Entanglement Between Government And Religion.

The third prong of the *Lemon-Nyquist* test requires that governmental action must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The court of appeals erred when it determined that there was no evidence of excessive entanglement of government with religion by Broadlawn's employment of a chaplain. (App. 38-40).

The entanglement of government and religion can be no greater than is present in this case because a religious person, as embodied in the chaplain, is an actual employee of BMC, a government financed and

operated hospital. The resulting relationship between government and the religious authority is one of employer/ employee. The government has full authority to pay her, evaluate her and dismiss her if it is dissatisfied with her services. There is a continuing day-to-day relationship between the chaplain and her supervisor, Lloyd Kaufman, Director of the Department of Social Services, who must work together resolving matters related to schedules, assignments and problems that arise. This administrative entanglement of the government and religious persons violates the Establishment Clause. *See Aguilar v. Felton*, 437 U.S. 402, 413-14 (1985).

Since the employment of a chaplain and the services that she provides violate all

three prongs of the *Lemon-Nyquist* test, her employment at BMC and the services she provides are proscribed by the Establishment Clause. The Court should review this case so that the erroneous decision of the court of appeals may be corrected instead of being used as precedent to allow public hospitals throughout this country to unconstitutionally use taxpayer monies to employ chaplains.

E. The Free Exercise Clause Does Not Require Broadlawns Medical Center To Employ A Chaplain.

The Free Exercise Clause is a prohibition on activity by the government and is not a mandate for affirmative action. It prevents the government from prohibiting the free exericise of religion. In order

for the Free Exercise Clause to be applicable, there must be a showing of a direct governmental compulsion of a person's religious freedom. *Wallace v. Jaffree*, 472 U.S. 38, 61, fn. 51, 105 S.Ct. 2479, 2492, fn. 51 (1985).

The court of appeals correctly concluded that it is only the limited classes of BMC patients who are involuntarily committed people or prisoners who would have any Free Exercise claim to have the government provide a chaplain to them, since their commitment is the only government compulsion that exists in this case. (App. 40-41). The court erred, however, in concluding that even these limited classes of patients are entitled to have BMC provide a chaplain for them.

As explained in Petitioner's first reason for granting this Petition, prisoners and other people who are committed by the government so that their ability to freely exercise their religious rights is restricted have no right under the Free Exercise Clause to require the government to provide chaplains and other religious services to them. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Thompson v. Commonwealth of Kentucky*, 712 F.2d 1078, 1080 (6th Cir. 1983); *Gittlemaker v. Prasse*, 428 F.2d 1 (3d Cir. 1970); *cf. O'Lone v. Estate of Schabazz*, 482 U.S. _____, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987). Since such persons have no Free Exercise right to force the government to provide a chaplain, the government cannot provide a chaplain if providing a chaplain

violates the Establishment Clause. BMC's employment of a chaplain to provide religious services does violate the Establishment Clause, so the employment of the chaplain is unconstitutional. The court of appeals' contrary decision should be reviewed and reversed.

F. The Principles Of *Marsh v. Chambers* Do Not Apply To The Employment Of A Hospital Chaplain.

In *Marsh v. Chambers*, 463 U.S. 783, the Court upheld the Nebraska legislature's practice of paying a Presbyterian minister a small salary to open each day's session of the legislature with a prayer. The key factor in *Marsh* was that the United States Congress which had passed the First Amendment to the Constitution

had also adopted, within one week after adopting the First Amendment, a provision to provide for a Congressional chaplain. The adoption of both provisions by the same Congress shed light on whether the authors of the First Amendment believed that the Amendment prohibited ceremonial legislative prayer. The Court held that it did not. 463 U.S. at 790-91.

None of the three important factors which were present in *Marsh* are present in this case. First, this case does not involve ceremonial prayer to open a legislative session. Instead, it involves a chaplain employed to provide prayers, sacraments, Bible readings, and other private religious services to patients, families and employees at BMC.

Second, there is no long history of

paid chaplains at BMC which is remotely similar to the 200-year history of having a paid chaplain for the United States Congress and the 100-year history of having a paid chaplain for the Nebraska legislature. Instead, BMC has had a paid chaplain since November of 1985, who began her employment after the commencement of this lawsuit. Prior to that, BMC was identical to all of the other county hospitals in Iowa that do not have any paid chaplains.

Third, there is no evidence that the Congress, when it enacted the First Amendment, also contemplated county hospitals paying for chaplains, unlike the contemporaneous enactment of a resolution calling for a paid congressional chaplain.

Therefore, the *Marsh* analysis is inapplicable to this case and does not permit BMC to employ a chaplain.

CONCLUSION

This is a case of major constitutional importance since it will determine whether public hospitals and prisons throughout the nation may use taxpayer monies to employ chaplains to provide religious services to patients and inmates. Contrary to the principles enunciated by the Court, the United States Court of Appeals for the Eighth Circuit incorrectly concluded that BMC's chaplain does not have the purpose and effect of advancing religion. It also erred in concluding that the Free Exercise Clause authorizes BMC to provide a

chaplain to certain patients. Therefore, petitioners request the Court to review this case and correctly decide that public hospitals may not use taxpayers' monies to support religious activities.

Respectfully submitted,

SCOTT HARTSOOK
Suite 22
315 East Fifth Street
Des Moines, IA 50309-1984
(515) 243-2151

COUNSEL FOR PETITIONERS

APPENDIX

I. OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2393
No. 87-2425

Larry Henry Carter, Courtney Demaris Carter, and Maurice Labelle,	*	
Appellants,	*	
	*	CIVIL NO. 84-800-E
vs.	*	
Broadlawns Medical Center, Polk County Hospital Trustees; Douglas Hart; John Ahern; William Dyar; Carole Romine; Margaret Stout; Jeanne Miller; Milton Brown, Executive Director; Charles Ingersoll, Hospital Director; Quentin Hunter, Social Services Director, Lloyd Kaufman, Volunteer Chaplain; Peter Pintus and Raymond Runkel,	*	Appeal from the United States District Court for the Southern District of Iowa
	*	Entered
	*	September, 13, 1988
Appellees.	*	

Submitted: March 14, 1988

Filed: September 13, 1988

Before HEANEY and JOHN R. GIBSON, Circuit Judges, and HARPER,* Senior District Judge

JOHN R. GIBSON, Circuit Judge.

*The HONORABLE ROY W. HARPER, Senior United States District Court Judge for the Eastern and Western Districts of Missouri, sitting by designation.

This case arises under the religion clauses of the first amendment and requires us to determine whether, on the record before us, a county hospital may hire a chaplain paid with taxpayer's moneys. Larry Henry Carter, his minor daughter, Courtney Demaris Carter, and Maurice LaBelle filed this civil rights suit against Broadlawns Medical Center, a county hospital, several individuals associated with Broadlawns, and Iowa Interfaith Agency for Peace and Justice, seeking damages and an injunction prohibiting Broadlawns from hiring a chaplain. The district court[1] held that

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[1]The Honorable Donald E. O'Brien, Chief Judge, United States District Court for the Northern District of Iowa and Judge, United States District Court for the Southern District of Iowa.

employing the chaplain would be an unconstitutional establishment or religion, were it not for conditions justifying her employment under the free exercise clause. Accordingly, the court permitted the employment, but imposed restrictions on the chaplain consistent with the parameters of a free exercise rationale for her employment. The court also awarded the taxpayers attorneys' fees under 42 U.S.C. § 1988 (1982). Broadlawns appeals the portion of the order imposing the restrictions and awarding fees. The taxpayers cross-appeal, attacking the district court's decision to permit Broadlawns to employ a chaplain and its refusal to enjoin various practices related to the chaplaincy. The taxpayers also argue the district court should have

granted them damages and more attorneys' fees. We affirm the district court's order in part and remand for the district court to modify its order in part and to reconsider the attorneys' fees award in light of our opinion.

Broadlawns is a county hospital in Polk County, Iowa, which serves the county's indigent. Broadlawns has a psychiatric ward, which makes up about fifty percent of the inpatient population, and a chemical abuse unit. About a third of the psychiatric patients have been committed involuntarily. Patients in the psychiatric and chemical abuse wards are not free to leave at will, and the less than twenty-five percent of the patients in those wards who are allowed to leave at all must obtain passes. The hospital also

confines prisoners of law enforcement agencies who are sent there for treatment.

In the past Broadlawns depended on a volunteer chaplain program under which volunteers would counsel patients and perform other chaplaincy services with no remuneration from Broadlawns. Though there was evidence that Broadlawns sought diligently to obtain sufficient numbers of volunteer chaplains to serve its patients, the program proved inadequate to meet the patients' needs, because of lack of manpower and lack of experience on the part of the volunteers, especially in dealing with the large population of psychiatric patients.

In 1984 the Broadlawns Board of Directors voted to employ a full time chaplain. Iowa Interfaith Agency for

Peace and Justice agreed to screen the applicants. Larry Henry Carter, Courtney Demaris Carter and John Doe (later identified as Maurice LaBelle) sue as taxpayers under 42 U.S.C. § 1983 (1982) and 42 U.S.C. § 1985 (1982) to enjoin Broadlawns from hiring a chaplain and for damages. The district court denied the taxpayers' motion for temporary restraining order, *Carter v. Broadlawns Medical Center*, No. 84-800-E (S.D. Iowa Sept. 9, 1985), and Broadlawns hired its present chaplain, Maggie Alzeno Rogers.

At the trial for the permanent injunction and damages, there was evidence that Rogers has a Masters of Divinity degree and is trained in grief counseling and Clinical Pastoral Education, or C.P.E. She is not an ordained minister, but is a

deacon of the United Church of Christ.[2] The precepts of C.P.E. are central to Rogers' practices at Broadlawns. Under the principles of C.P.E., a chaplain makes himself available for counseling, but allows the patient to direct the conversations and avoids initiating or guiding religious discussion. Rogers testfied:

> The philosophy is * * *we do not force your faith understanding on anyone. We do not proselytize, that is a violation of a person who is already in a fairly helpless condition, crisis situation, everything else is already up in the air. So you're very careful not to violate that person's human rights.
>
> You listen very carefully to their story, to their faith language, to the symbols that are important to them, and you help them find the resources of faith and the resources of their life whether that be family or their church or their faith or their own

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[2]Broadlawns did not require candidates for its chaplaincy to be affiliated with any particular religion.

> history, how have I gotten through hard situations before, and help them to find their own strengthening and own courage. To do anything else than that, according to the philosophy of CPE, is unconscionable.

Tr. 101. She testified that she was trained to counsel atheists as well as theists of all persuasions, since CPE teaches its adherents "to facilitate just human expression whether that person be atheist or something else." Tr. 119.

Rogers' duties include calling on patients prior to surgery (whether or not the patient has asked to see her), making herself available for counseling in intensive care and surgery waiting rooms, and making rounds on the psychiatric and medical wards to see patients who have either expressed an interest in seeing her or have been referred to her by hospital staff or volunteer chaplains. She also

conducts Christian worship services and a Bible study class in the hospital for those who wish to attend and has conducted religious funerals and administers sacrament of holy communion when asked to do so. Rogers has developed a job description for her position, which states in part that her job is: "[T]o provide consistent pastoral care throughout the Medical Center, adding spiritual support and counseling to the ongoing healing effort." *Carter v. Broadlawns Medical Center*, 667 F.Supp. 1269, 1272 (S.D. Iowa July 9, 1987).

Medical witnesses testified to the usefulness of Rogers' style of chaplaincy from a medical point of view. Dr. Berry Engebretsen, Broadlawns' Medical Director for the Primary Care Unit, testified that

the hospital should use a "wholistic" approach to medicine, and that this means that the patient's "spiritiual" as well as bodily, social and emotional states affect his health, "you need to have tools and methodologies to diagnose and treat the entire picture of human health." Tr. 615. Engebretsen testified that by using the word "spiritual", he did not mean to imply adherence to "a particular denomination or world religion." Tr. 615.

The Broadlawns Director of Psychiatry, Dr. Timoth Olson, testified that psychiatric patients often need the support provided by a chaplain and stressed those patients' inability to leave the hospital at will and the isolation from ordinary sources of support frequently caused by their mental illness itself. He testified

that it was necessary to have an experienced chaplain who was able to work with the doctors in caring for Broadlawns' psychiatric patients, particularly those with religious delusions. The volunteer chaplain program had been unsatisfactory because the volunteer chaplains did not have the special experience necessary for working with these patients. Olson testified:

> [Our patients] are suggestible and vulnerable, as I've mentioned, and in many ways they are quite different than the clients that most chaplains work with. I think that it requires someone with a fair amount of experience in working with these patients, and I think it's important that someone coordinate the volunteer chaplains so that they understand some of the special features of our patients.

Tr. 237.

Rogers herself testified about ways that she is able to help the physicians

communicate with patients and their families in difficult situations: "I am a liaison between [the patients' families] and the rest of the medical team." Tr. 48 "Medical doctors and psychiatrists sometimes call me for consults * * *." Tr. 56. For example, doctors might ask her to talk to a dying patient about whether he wanted to be in "do not resuscitate" status. Tr. 56. "Psychiatrists also call on me for consults. If a patient comes into [the psychiatric ward] with some religious ideations of one kind or another, would you go and see so and so and get back to me and let me know what you think * * *." Tr. 57.

Rogers' testimony brought out the fact that in situations of grave illness, insanity and death, religious problems exist

and must be dealt with no matter how secular the hospital. Rogers is able to serve as a moderator between persons experiencing the most profound religious problems and the public employees who must care for those persons.

On the basis of these facts, the district court held that the chaplaincy generally was consititutional, but imposed some restrictions on the chaplain's activities. 667 F.Supp. at 1283. The court first considered whether the chaplaincy constituted a state establishment of religion. It determined that there was no evidence of long-standing historical practices like those underlying the legislative chaplaincy upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). 677 F.Supp. at 1279.

Therefore, the court applied the three part establishment test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), which inquires "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion." *Lynch v. Donnelly*, 465 U.S 668, 679 (1984). The district court "recognize[d] that Chaplain Rogers fulfills some secular duties at the hospital, including grief counseling and other secular patient counseling. * * * The principles of CPE appear to indicate that a person's 'spiritual needs' do not necessarily mean 'religious needs.'" 667 F.Supp. at 1279. However, because "[o]ne of [the chaplaincy's] main purposes [was]

to meet the religious needs of patients," *Id.*, the court held the chaplaincy failed the *Lemon* "secular purpose" test. Next, the court applied the *Lemon* "secular effect" test and held that the effect of the chaplaincy was to promote religion: "Paying a chaplain to provide religious care (while not the chaplain's only duty), is an advancement of religion." 667 F.Supp. at 1279. The court concluded the chaplaincy entailed no undue entanglement between church and state, but since the court had already found problems in the purpose and effect inquiries, it held the chaplaincy could not pass the *Lemon* test. 667 F.Supp. at 1280.

The court then determined that because the patients at Broadlawns had little ability to leave in search of spiritual counseling, whether because of their health,

their indigency or psychiatric ward restrictions, hiring a chaplain to come to them was a constitutional accommodation of the patients' free exercise rights. *Id.* at 1280-81.

Therefore the court determined that the chaplaincy was permissible, but imposed some restictions on Rogers' activities consistent with the free exercise rationale. It held Rogers could not counsel those whose mobility was not restricted--that is, patients' families not engaged in a death-bed vigil, employees and outpatients. *Id.* at 1282. By later order, the court modified the July 7 order to permit Rogers to counsel oncology outpatients and their families. *Carter v. Broadlawns Medical Center*, 672 F. Supp. 1149, 1150 (Sept. 9, 1987).

The court also concluded that Broadlawns' policy of allowing chaplains open access to medical records invaded the patients' privacy rights, and the court ordered the hospital to require express permission from the patient or his guardian before granting chaplains such access. 667 F. Supp. at 1282. The court refused to award damages, *Id.* at 1283, or to enjoin Broadlawns from reserving parking spaces for chaplains, letting the chaplains wear "chaplain" name tags, storing religious artifacts in a conference room for use at worship services, or providing a space on admission forms where patients may (but do not have to) indicate their religious preferences. *Id.* at 1281.

In a later order the court held that since the taxpayers succeeded in restricting the chaplain's activities, they were prevailing parties and entitled to attorneys' fees of $18,871.20 and expenses of $902.45. 672 F. Supp. at 1151.

On appeal Broadlawns urges us to modify the court's order by lifting the restrictions placed on Chaplain Rogers' practices and eliminating the attorneys' fees award. The taxpayers cross appeal, arguing that the court erred in permitting employment of a chaplain even with the restrictions, in denying their several claims for related injunctive relief, and in not awarding damages or sufficient attorney fees. We shall consider first the general question of whether Broadlawns

may hire a chaplain; next, the propriety of the restrictions the district court imposed; and finally, the arguments that the district court did not grant enough relief.

I.

Broadlawns defends the constitutionality of hiring a chaplain under two discrete establishment clause analyses: the historical analysis employed in *Marsh v. Chambers* and the three part test of *Lemon v. Kurtzman*. Broadlawns' historical evidence consisted of testimony that Broadlawns had a long-standing volunteer chaplain program, that state mental hospitals have paid their chaplains since about 1950, and that the state has paid

chaplains for its prisons since the nineteenth century. June 26, 1986 Tr. 29-30. In *Marsh v. Chambers* evidence of the contemporaneous actions of those who drafted the first amendment was held to reveal that the legislative intent behind the first amendment is not violated by legislatures maintaining chaplains. 463 U.S. at 786-92. We do not believe the evidence recounted in *Marsh* can support a rule permitting state sponsored chaplaincies of any stripe. Nor is Broadlawns' evidence of relatively long-standing practices in Iowa sufficient to win the day under *Marsh*, since *Marsh* made it clear that the mere fact that a practice has been carried on for a long time is not determinative, 463 U.S. at 790, and the trial evidence of Iowa state practices

sheds no light on the legislative intent of the first amendment's framers, as the evidence did in *Marsh*.[3]

Under the three part *Lemon* test, the district court's findings of historical fact are reviewed under the clearly erroneous standard. However, it appears from a close reading of the methodology used by the majority in *Lynch v. Donnelly* that the ultimate conclusion of whether a practice passes each part of the test is a mixed

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[3]Our research indicates that the practice of employing chaplains in publicly funded asylums dates back to at least 1866. *See* Veteran's Administration Manual M6-3 (Chaplain's Manual) 1 (1950). Since our opinion rests on other grounds, we will not ask the parties to address the propriety of taking judicial notice of this informaiton or the significance of this information under *Marsh v. Chambers*.

question of fact and law. *See Lynch*, 465 U.S. at 678-85; *see also Lynch*, 465 U.S. 691, 693-94 (O'Connor, J., concurring) ("Whether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is * * * in large part a legal question * * *"); *Wallace v. Jaffree*, 105 S. Ct. 2479, 2500-01 (1985) (O'Connor, J., concurring). *Cf. Lynch*, 465 U.S. at 680-81 (Burger, C.J.) (using language of the clearly erroneous test) and *Id.* at 704 n.11 (Brennan, J., dissenting). In this case the findings of simple historical fact are, for the most

part, uncontroverted.[4] The arguments focus on the reasoning by which the district court moved from the historical facts to the ultimate conclusions under the *Lemon* test; thus, the issues are limited to questions of law.

The first question posed by the *Lemon* test is "whether the challenged law or practice has a secular purpose." *Lynch*, 465 U.S. at 679. *Lynch* made it clear that the presence of religious purposes would not doom a law or practice, as long as there was also a secular purpose. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when

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[4]The taxpayers do argue that the volunteer chaplain program adequately served Broadlawn' needs, but the district court's findings to the contrary, 667 F. Sup. at 1271, are well supported by the evidence.

it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. Even where the benefits to religion were substantial * * * we saw a secular purpose and no conflict with the Establishment Clause." *Id.* at 680 (citations omitted). *Accord, Wallace v. Jaffree,* 105 S. Ct. at 2490.

Though the district court correctly observed that the challenged action need not be exclusively secular to pass the purpose test, 667 F. Supp. at 1279, in actuality it considered the presence of a religious purpose fatal, despite factual findngs establishing a valid secular purpose. The court recognized Rogers fulfilled some strictly secular duties, "including grief counseling and other

patient counseling. * * * The principles of CPE appear to indicate that a person's 'spiritual needs' do not necessarily mean 'religious needs.'" *Id.* The court also recognized that in the context of Broadlawns, even Rogers' religious duties had a secular purpose: "BMC's intent in hiring Maggie Rogers was to enhance the hospital's 'wholistic' treatment approach." *Id.* at 1274; *accord*, *Id.* at 1275. In other words, the purpose of the chaplaincy was the same as that of the hospital generally--to help patients get well or at least to provide the best care possible for those who would not get well. But from these factual findings, the court drew the legal conclusion that the chaplaincy failed the purpose test: "However, * * * the Court concludes that

the chaplain's position is not clearly secular. *One* of its main purposes is to meet the religious needs of patients." *Id.* at 1279 (emphasis added).

The district court in this case slipped into the same legal error made by the district court in *Lynch v. Donnelly*, by focusing on the religious purpose in isolation from the larger context, which reveals a valid secular purpose: "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause . . . . The District Court plainly erred by focusing almost exclusively on the creche." 465 U.S. at 680. The *Lynch* court held that, when seen in the proper context, the religious symbols in the creche were simply part of the

celebration of the secular Christmas holidays. *Id.* at 680-81.

The Second Circuit used reasoning similar to that of *Lynch* in *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), in which taxpayers challenged the Army's chaplaincy program on Establishment Clause grounds. The court remarked that if viewed in isolation the religious aspects of the chaplaincy would fail the *Lemon* test:

> If the current Army chaplaincy were viewed in isolation, there could be little doubt that it would fail to meet the *Lemon v. Kurtzman* conditions. Although the ultimate objective of the chaplaincy may be secular in the sense that it seeks to maintain the efficiency of the Army by improving the morale of our military personnel, its immediate purpose is to promote religion by making it available, albeit on a voluntary basis, to our armed forces.

755 F.2d at 232. The *Katcoff* court

rejected the *Lemon* test, reasoning that it does not take into account the necessary deference to Congress' war power and the military personnel's free exercise rights. *Id.* at 235. The court affirmed partial summary judgment for the defendants on the grounds that the government's demands on soldiers who were far from home burdened their free exercise rights and that there were important military reasons for providing chaplains to the personnel: "[T]he morale of our soldiers, their willingness to serve, and the efficiency of the Army as an instrument for our national defense rests in substantial part on the military chaplaincy, which is vital to the Army's functioning." 755 F.2d at 237. *See also Id.* at 228 (explaining at length military purposes of chaplaincy). But as to those

personnel whose stations did not isolate them from other opportunities to practice their religions, the court remanded for trial, to develop the issue of whether chaplaincy services to these personnel were "relevant to and reasonably necessary for the conduct of our national defense by the Army." 755 F.2d at 238.

Although the Second Circuit considered itself to be using a different test, the analysis was the same used in *Lynch*--determining whether a practice with religious purpose, when seen in context, also has a secular purpose. ***See also Stein v. Plainwell Community Schools***, 822 F.2d 1406, 1409 (6th Cir. 1987) (prayers at graduation exercises can serve secular purpose of "solemnizing" occasion); ***Van Zandt V. Thompson***, 839 F.2d 215, 1221 (7th

Cir. 1988) (prayer room in State Capitol has secular purpose of promoting meditation: "The Resolution [authorizing the prayer room] suggests that [the legislators] may legislate better for having taken some time to think quietly").

Accepting the district court's findings of historical fact, we conclude that the finding that Broadlawns hired Rogers to enhance its wholistic treatment approach to patient care establishes a valid secular purpose under the *Lemon* test.

The second question posed by the *Lemon* test is whether the challenged practice has the principal or primary effect of advancing or inhibiting religion. Once again, the district court's findings of historical fact on this issue belie its

ultimate conclusion that the effect of the Broadlawns' chaplaincy was to advance religion. The district court's findings stress the fact that the existence and nature of the religious content in Rogers' services to a patient depended entirely on the patient's pre-existing preferences:

> The record is clear that Chaplain Rogers does perform her duties consistent with the concept of Clinical Pastoral Education (CPE). The explanation of this concept demonstrates that in this setting, the chaplain's function is not the traditional parish-or institutional-style ministry. Rather, its purpose is to address the needs of the individual patients, as defined by the patient, not the chaplain. Proselytization or any effort to impact [sic] religion or religious beliefs upon individuals who do not already have such beliefs is totally inconsistent with the CPE concept and is scrupulously avoided by Chaplain Rogers.

667 F. Supp. at 1274. The district court also found that Rogers "does not view her

primary focus as religious." *Id.* at 1281. The evidence supported these findings of neutrality. Rogers' testimony established that patients of all persuasions may take advantage of her counseling on their own terms, and there was testimony by one chaplain from another hospital (who was also trained in C.P.E.) about a recent instance in which an atheist patient had come to him for grief counseling. June 26, 1987 Tr. 37.

The taxpayers argue that the chaplaincy violates the effect test by inculcating particular beliefs, by subsidizing religious activities, and by effecting a "symbolic link" between church and state.

The district court's findings that Rogers has avoided proselytization show

that there is no direct advancement of religion by Broadlawns inculcating any religious belief or practice.

The district court based its conclusion that the chaplaincy violated the effect test on the fact that the state was providing financial aid to enable persons in its care to practice their religions: "Paying a chaplain to provide religious care (while not the chaplain's only duty), is an advancement of religion." *Id.* at 1279. However, some financial benefit to religion has been tolerated in cases applying the *Lemon* effect test. *See Lynch*, 465 U.S. at 681-82. The district court's findings of neutrality distinguish this case from cases such as *Grand Rapids School District v. Ball*, 473 U.S. 373, 105 S. Ct. 3216, 3228-29 (1985),

where state subsidies would got to sectarian institutions, and also from cases in which state law favored religious citizens over nonreligious ones. *E.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S. Ct. 2914, 2918 fn. 9, 86 L. Ed. 557 (1985) (law requiring employees to give sabbatarian employees their sabbath day off work favored religious employees over others with nonreligious reasons for wanting a particular day off). Instead, the money is spent to employ a counselor who has the versatility and training to help persons all along the continuum of religious dispositions, from those who only desire nonreligious counseling to those who desire religious discussion and ritual.

The taxpayers also argue that

Broadlawns has violated the "effect" element of *Lemon* by creating a symbolic tie between church and state. Again, the findings of neutrality of the chaplaincy as practiced by Chaplain Rogers distinguish this case from those cited by taxpayers. In *Ball* the state programs were declared unconstitutional in part because they tended to give the school children the impression that the state supported their particular denomination. 105 S. Ct. 3226-27.[5] In *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (W.D.N.C. 1980), a city entered an agreement with a

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[5]*Ball* is also distinguishable because it involved impressionable school children, *see* 105 S. Ct. at 3226, and the Supreme Court has been "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 107 S. Ct. 2573, 2577 (1987).

particular congregation for the congregation to select a police chaplain whose salary would be paid partly by the congregation and partly by the city. Though the evidence established that the chaplain believed it was his duty to abstain from proselytizing, 495 F. Supp. at 592, the symbiotic relationship created between the city and a particular congregation is enough to distinguish this case from the holding of *Voswinkel*. *See* 495 F. Supp. at 596. *Cf. Stein*, 822 F.2d at 1410 (Milburn, J., concurring) ("If a prayer is nonsectarian and nondenominational, it does not cross that boundary of putting the state's imprint on religion.").

The taxpayers also argue that the chaplaincy violates the effect test because it is politically divisive.

Without evaluating whether the record reflects divisiveness, we simply observe that the Supreme Court has confined "the question of 'political divisiveness' * * * to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.'" *Bowen v. Kendrick*, 108 S. Ct. 2562, 2578 fn. 14 (1988) (quoting Mueller v. Allen, 463 U.S. 388, 404 n. 11 (1983)).

In sum, we cannot conclude that the facts as found by the district court show an impermissible advancement of a particular religion, or of religion over non-religion.

The final question of the *Lemon* test is whether the challenged practice gives rise to undue entanglement between church and state. The district court held it did

not. We agree with that holding, in light of the evidence that Chaplain Rogers' presence has in fact reduced the need for oversight of the volunteer chaplains by other hospital personnel, because it is part of Rogers' job to supervise the volunteer chaplains to make sure they abide by the non-proselytization principles of C.P.E. Tr. 119, 141, 237. It is obvious that employing a chaplain causes some entanglement, but the testimony in this case showed time and again that the nature of the hospital's services make it necessary for hospital employees to deal with patients' religious problems in making decisions about how to care for the patients. Decisions such as whether to resuscitate a patient or allow him to die have a religious tenor for most

patients that the hospital cannot avoid, either by ignoring it or by depending on a volunteer program that the district court found inadequate, 667 F. Supp. at 1271. *Cf. Wilder v. Bernstein*, 848 F.2d 1338, 1348 (2d Cir. 1988) (By undertaking to provide foster care for children, state will inevitably face some entanglement in religion attendant on providing children religious education; therefore, entanglement test invovles comparing degrees of entanglement attending various courses of action). The evidence indicates that hiring a person trained to facilitate the patients' resolution of religious dilemmas should lessen, not increase, the hospital's entanglement in them.

Though we disagree with the district court's conculsion that the Broadlawns

chaplaincy violated the Establishment Clause, we agree with the district court's alternative theory that the chaplaincy is a permissible accommodation of at least some patients' free exercise rights. There was evidence that a large percentage of Broadlawns' patients were subject to restrictions on their movement attributable to the state by virtue of the fact that the patients were prisoners or had been involuntarily committed or by virtue of hospital rules in the psychiatric ward. Such restrictions constitute a state-imposed burden on the patients' religious practices that the state may appropriately adjust for. *See Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2869, (1987); *Id.* at 2874-75 (O'Connor, J., concurring in judgment); *Katcoff v. Marsh*,

755 F.2d at 234; *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir. 1986).

II.

Most of the restrictions the district court imposed on Rogers' practices resulted from the court's conclusion that the chaplaincy was only permissible insofar as it alleviated the obstacles to religious practice posed by the patients' immobility. Since our holding does not rest on the fact of immobility, but on the secular goal of helping patients to get well, it is appropriate to lift the restrictions prohibiting Rogers from counseling outpatients and patients' families. Allowing the chaplain to counsel outpatients has the same therapeutic value as letting her counsel inpatients. While one

could argue that counseling patients' families does not directly serve the therapeutic purpose of the chaplaincy described by the witnesses, the argument would be unrealistically restrictive. To the extent the chaplain counsels families, it is largely to help them cope with the problems resulting from the patients' illnesses and to serve as a liaison between the families and the medical staff. Tr. 47-49. Therefore, allowing her to counsel the families serves the same purpose as counseling the patients.

However, Chaplain Rogers' testimony describing her counseling of hospital employees indicates that this counseling focuses on problems other than the patients' illnesses. Though Rogers

discussed at length the services she provides to employees, Tr. 51-54; Aug. 26, 1987 Tr. 21-24, the examples she cited did not appear to fit in with the purpose of providing wholistic medicine to the patients. She made the general observation that providing the staff counseling helped them serve the patients better. Aug. 26, 1987 Tr. 22. This wide-ranging principle, however, is far too loosely related to the secular healing purpose found by the district court to permit Chaplain Rogers to engage in religious counseling of the employees.

However, the record established that Chaplain Rogers also provides a significant amount of purely secular counseling to the employees. She testified that her exchanges with staff members primarily

involved assisting the employees with personal problems, such as letting off steam about supervisors, dealing with gossip and teen-age children, and venting grief over loss of a family member. Chaplain Rogers viewed her service as giving support and encouragement, and she stated that it was relatively rare for these interactions to assume a religious nature. Tr. 52. If the hospital chooses to use Rogers to provide strictly secular counseling to its employees, it is evident that there is no constitutional barrier to this decision.

Accordingly, the district court's order should be modified insofar as it restricts the chaplain from engaging in employee counseling that is non-religious in nature, and we remand to the district court to fashion an appropriate order.

The restriction requiring the chaplain to have express permission to review medical records is consistent with and even mandated by the non-coercion reasoning we have used today. Central to our decision in this case is the idea that the nature and extent of Rogers' services to a patient are entirely dependent on the patient's wishes. Permitting a chaplain to review the patient's records without the patient's (or his guardian's) permission would undermine the findings of neutrality we have so heavily relied on.

III.

The taxpayers' additional claims for substantive relief were all properly denied.

Permitting chaplains to wear name tags

and to call on patients to ask whether the patient desires a chaplain's services; providing parking spaces for clergy, blanks on admissions forms for indicating religious preference on an optional basis, and optional religious services; and storing religious supplies in the hospital for use at the optional services are all practices that are reasonably necessary accoutrements of the chaplaincy and that are covered by our analysis of the chaplain question.

The district court's decision that it was not necessary to reach the taxpayer's claim under 42 U.S.C. § 1985 was proper, since the taxpayers alleged the same injury under section 1983 and section 1985 and the court gave them all the relief to which they would have been entitled under

either statute. Moreover, the district court found there was no conspiracy to support a section 1985 claim. 667 F. Supp. at 1277.

In light of the district court's finding that the taxpayers have not had their medical files reviewed by a chaplain, the district court's findings of no damages was quite proper.

The factors relevant to setting the attorneys' fee award have been affected by our opinion today, which alters the degree of success the taxpayers achieved, *see generally Hensley v. Eckerhart*, 461 U.S. 424, 434-47 (1983), and we therefore remand the attorney's fee portion of this case for redetermination in light of the modifications we have ordered.

The district court's order granting

injunctive relief and denying damages is affirmed, but must be modified to eliminate the restraints prohibiting Broadlawns' paid chaplain from counseling patients' families and outpatients, and from providing non-religious counseling to Broadlawns' employees. The case is remanded to the district court to enter an order consistent with this opinion.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

II. DISTRICT COURT'S ORDER REGARDING RESPONDENTS' NEW TRIAL MOTION AND PETITIONERS' ATTORNEY FEES MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LARRY CARTER, et al.,	)	
Plaintiffs,	)	CIVIL NO. 84-800-E
vs.	)	ORDER
BROADLAWNS MEDICAL CENTER, et al.,	)	Entered September 29, 1987
Defendants.	)	

This matter is before the Court on defendants' motion for a new trial and to amend the judgment and on plaintiffs' motion for attorney fees. A hearing was held on August 26, 1987. After careful consideration of the parties' briefs and arguments, and the additional testimony of Chaplain Maggie Rogers, the Court grants both motions in part and denies them in part.

Defendants' Motion for a New Trial or to Amend the Judgment

This case involved a challenge to the hiring of a tax-paid chaplain by Broadlawns Hospital. Plaintiffs allege that a tax-paid chaplain at a county hospital violated the Establishment Clause, and sought to enjoin the hiring. This Court denied plaintiffs' request for a preliminary injunction on September 9, 1985. (See No. 32 in the Clerk's Memorandum of Papers). Following the bench trial, this Court entered a Memorandum Opinion and Order finding that, while a tax-paid chaplain arguably violated the Establishment Clause, the hiring was required under the Free Exercise Clause. The Court's decision was premised on the finding that in-patients

and psychiatric patients at Broadlawns were not free to come and go and, thus, were unable to freely exercise their religion unless a chaplain was on the premises. The Court further found that volunteer chaplains were unable to fill this void.

While the Court did permit BMC to hire a chaplain, it also restricted her duties somewhat. The Court enjoined the chaplain from providing religious services and counseling to BMC empoyees, out-patients and family members of patients who were not in life-and-death situations. The Court reasoned that these individuals were not resricted as in-patients and psychiatric patients were and that, therefore, they were able to seek out their own minister or religious counselor. BMC

vehemently objects to these restrictions and has asked for a new trial or, in the alternative, an amended judgment.

The Court has carefully considered all the evidence at trial, counsel's arguments and briefs, and the additional testimony of Chaplain Rogers taken on August 26. The Court is persuaded that its Memorandum Opinion and Order dated July 9, 1987 was not in error, either factually or legally, and denies BMC's motion for a new trial. However, the Court does grant BMC's motion to amend the judgment in part, to permit Chaplain Rogers to provide counseling to patients who attend the oncology unit and their families.

In its July 9 order at page 28, this Court ruled that "[the chaplain] may provide grief counseling services to families

that are at the hospital and for all practical purposes are not free to leave because a loved one is in a life-death situation." At the hearing on August 26, Chaplain Rogers testified that since the trial, she has begun working in BMC's oncology unit where she visits with patients who have been diagnosed as having cancer and their families. She further testified that while usually this is a life-or-death situation, the oncology unit is run on an out-patient basis. The Court has reconsidered that portion of its July 9 order prohibiting Chaplain Rogers from providing counseling to families and out-patients. The Court finds that the oncology unit involves life-or-death situations. Therefore, the Court amends its July 9 order to permit Chaplain Rogers

to provide grief counseling to oncology unit out-patients and their families. The remaining portion of defendants' motion for new trial or to amend the judgment are hereby denied.

Attorney Fees

Plaintiffs have requested attorney fees pursuant to 42 U.S.C. § 1988. Under § 1988, plaintiffs must show they are prevailing parties. Defendant BMC argues that plaintiffs are not prevailing parties, as they were unsuccessful in preventing the chaplain's hiring. In *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the Supreme Court held that plaintiffs may be considered prevailing parties under § 1988 "if they succeed on any significant issue in litigation which achieves some of

the benefits the parties sought in bringing suit." Under this formulation, the Court finds that plaintiffs are prevailing parties. While plaintiffs did lose on the ultimate issue of the chaplain's hiring, they were successful in persuading this Court in placing some restrictions on her activities.

Since plaintiffs are prevailing parties, the next question is the reasonableness of the fee. Plaintiffs have requested $47,178.00 in attorney fees (393.15 hours times $120.00 per hour) and $902.45 in costs, for a total of $48,080.45. Defendants alternatively argue that while plaintiffs may be prevailing parties, they are not entitled to the total amount requested in fees, as they were not totally successful--i.e.,

they failed to prevent the chaplain's hiring, and also never requested some of the relief ultimately obtained. As for the latter argument, the Eighth Circuit has held that, in determining who was the prevailing party, the important consideration is what relief was *awarded*, not what relief was expressly requested by the pleadings. *Fast v. School District of City of Ladue*, 728 F.2d 1030, 1033 (8th Cir. 1984). Therefore, the Court will turn to defendants' argument that the plaintiffs were not totally successful.

In *Hensley*, the Supreme Court noted that it is "not necessarily significant that a prevailing plaintiff did not receive all the relief requested." *Id.* at 436 n.11. The Court concluded that, "[t]here is no precise rule or formula for

making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for limited success." *Id.* at 437; *accord, Maney v. Brinkley Mun. Waterworks,* 802 F.2d 1073, 1076 (8th Cir. 1986); *Rose v. Nebraska,* 748 F.2d 1258, 1264 (8th Cir. 1984).

The Court has carefully considered counsel's fee itemization and the actual relief obtained, and concludes that counsel's total fee award should be reduced to 40% of the amount requested. While plaintiffs were successful in limiting the chaplain's duties, their main goal had been to prevent BMC from hiring a chaplain. The Court has arrived at this figure by concluding that a 70% reduction

is appropriate, as plaintiffs did not prevail on their main contention and because at least one-half of the hours expended were put in on other issues. The size of this reduction is further adjusted by an enhancement of 10% which plaintiffs' counsel is entitled to because of the risk factor inherent in this novel case.

Defendants argue that this is foreclosed by the Supreme Court's decision in *Pennsylvania v. Delaware Valley Citizens' Counsel*, _____ U.S. _____, 55 U.S.L.W. 5113 (June 26, 1987). While the majority opinion stated that a risk factor should not be considered, only three justices so held. Justice O'Connor, while concurring in the judgment, sided with the dissenters in holding that Congress did not intend to foreclose consideration of

contingencies in setting a reasonable fee under fee-shifting statutes. However, Justice O'Connor did find that the district court erred in using a risk multiplier in that particular case. *Id.* at 5119. In view of the above split decision, this Court finds it may still consider the risk factor in awarding attorney fees. *See Laird v. Tatum*, 409 U.S. 824, 837-38 (1972)(memorandum of Renquist, J.); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). Therefore, despite the fact that plaintiffs' counsel spent at least half of his time contending that the chaplain should not be hired, the Court finds that it is proper to reduce his award to a net of 40%, to allow for the risk factor. The particular facts of this case had not, as

far as this Court could ascertain, ever been considered by any other court. Plaintiffs' counsel was thus required to spend certain hours educating himself as to the nuances of First Amendment law in order to properly prosecute this matter.

IT IS THEREFORE ORDERED that the defendants' motion for new trial is hereby denied.

IT IS FURTHER ORDERED that the defendants' motion to amend the judgment is hereby granted in part, and the Court finds that Chaplain Rogers may provide grief counseling to oncology unit patients and their families, notwithstanding that the oncology unit is run on an out-patient basis.

IT IS FURTHER ORDERED that plaintiffs are hereby awarded attorney fees and costs

in the amount of 40% of $47,178.00, or $18,871.20, plus expenses in the sume of $902.45, for a total of $19,773.65.

September 28, 1987.

/s/ Donald E. O'Brien
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

III. DISTRICT COURT'S MEMORANDUM OPINION AND ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LARRY HENRY CARTER, COURTNEY DEMARIS CARTER, DR. MAURICE LA BELLE,	)	CIVIL NO. 84-800-E
Plaintiffs,	)	MEMORANDUM OPINION AND ORDER
vs.	)	
BROADLAWNS MEDICAL CENTER, et al.,	)	Entered July 9, 1987
Defendants.	)	

This case presents a challenge to the employment of a full-time chaplain at a tax-supported county hospital, Broadlawns Medical Center (BMC). This Court had previously denied the plaintiffs' request for preliminary injunction preventing the employment of such a chaplain.[1] Having

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[1]The Court incorporates by reference its earlier order denying plaintiffs' request for a preliminary injunction.

carefully considered all the evidence, the Court finds that the employment of a chaplain at a tax-funded county hospital whose salary is paid for by tax revenues would violate the Establishment Clause of the First Amendment to the United States Constitution if that clause were viewed in isolation. However, the Court upholds BMC's present practice of employment of a female unordained minister whose primary purpose is to provide clinical pastoral care and grief therapy for patients and their families. The Court finds that this is permissible under the Free Exercise Clause of the First Amendment to the United States Constitution. The Court also places some restrictions on the chaplain's activities to ensure that the chaplain's job assignment conforms to the

rationale under which the Court sustains such a position. The Court also denies plaintiffs' claims for damages.

FINDINGS OF FACT

Defendant BMC is a public county hospital located in Des Moines, Iowa. Established pursuant to the Iowa Code Chapter 347, BMC is funded in the following ways: by property taxes levied on real estate located in Polk County, Iowa; by monies received from the State of Iowa and the federal government; and by payments from patients. BMC provides care free of charge or at a reduced rate to indigent citizens of Polk County. Most of the patients do not have access to a telephone. Approximately 50% of BMC's patients do not have insurance, do not

receive other governmental benefits, and are considered indigent.

BMC is controlled by a Board of Trustees elected by Polk County voters pursuant to Iowa Code §347.9. The Trustees have all of the powers delegated to them by the State of Iowa under Iowa Code Chapter 347, including the power to hire an administrator and other employees for BMC. (Iowa Code §347.13.4) The BMC Board of Trustees consists of seven members: Douglas Hart, John Ahern, William Dyar, Carole Romine, Margaret Stout, Jeanne Miller and Milton Brown. Plaintiffs have included each Board member as a defendant in this suit.

In December, 1983, Trustee Milton Brown received a letter from the Des Moines Area Religious Council urging the

Board to create a pastoral care department and to employ a full-time chaplain. BMC had never previously employed a chaplain, and instead had relied on volunteer chaplains, a system that had proved to be inadequate. The Trustees discussed this proposal at numerous meetings in early 1984. Plaintiff Larry Carter appeared at these meetings along with other Polk County citizens. Plaintiff Carter represented himself, spoke as a member of the BMC Primary Care Advisory Board, and acted on behalf of American Atheists in opposing the chaplain proposal. Later, during a session of this trial, Carter informed the Court that he had a breakup with the American Atheists and was thereafter speaking only for himself.

At a Board meeting on January 10,

1984, Defendants Lloyd Kaufman, Reverend Peter Pintus, and Reverend Raymond Runkel urged the Board to hire a chaplain. These individuals were persuaded that it was difficult for BMC to get volunteer chaplains to visit patients on a regular basis.[2] The Court is persuaded by the testimony and the exhibits (Exhibit F at p. 7) that the volunteer chaplain effort has, particularly in recent years, received a "very poor" response.[3]

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[2] Reverend Runkel testified that it had been very frustrating trying to get enough volunteers and that many times they only had a volunteer one or two days a week.

[3] The Court recognizes that the Polk County Jail has had no problems getting ministers to come to that facility. The Court is not persuaded that that situation is analogous to the issues at BMC.

On June 12, 1984, the Board of Trustees approved the funding of a "chaplain" position at BMC. However, instead of hiring a "chaplain" in the generally accepted meaning of that term, the Board hired Maggie Alzeno Rogers, a female, who is not an ordained minister. Maggie Rogers graduated from the University of Dubuque Theological Seminary in 1984. She is "endorsed" by the United Church of Christ. However, as stated previously, she is, by her own choice, not an ordained minister. (Tr. 5).[4]

Initially, Rogers was hired under the following job description:

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[4]The testimony of Maggie Alzeno Rogers has been transcribed. The balance of the trial has not been transcribed. All references to (Tr.) are references to her testimony.

> Provides religious ministry, pastoral care and counseling to patients, patients' families and staff of Broadlawns Medical Center. Recruits and coordinates the activities of volunteer chaplains.

(Exhibit E). Chaplain Rogers assisted in drafting a new job description after she began her employment (Tr. 13). It states in pertinent part:

> To provide consistent pastoral care throughout the Medical Center, adding spiritual support and counseling to the ongoing healing effort.[5]

(Exhibit 53, p. 1). Chaplain Rogers believes, and the Court finds, that her activities at BMC comply with the detailed job description of Exhibit 53 and with the

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[5]She testified that she did not carry a Bible (Tr. 15), that she had performed no baptisms (Tr. 28), and that she performed no services for children (Tr. 47) or unconscious patients (Tr. 62).

job description pursuant to which she was hired, Exhibit E.

Chaplain Rogers and the few volunteer chaplains who now assist her have had Clinical Pastoral Education (CPE). (Tr. 93). All volunteer chaplains adhere to the principles of CPE. CPE is specialized training that prepares a minister to be effective in a hospital or other institutional setting.

Regarding education in CPE principles, Chaplain Rogers testified as follows:

> Mr. Hartsook: What's taught in a basic clinical course?
>
> Chaplain Rogers: . . .You do a lot of work on your interpersonal style with other people, whether or not you can be self-disclosing or whether you hide behind your religion so to speak. You study how to be with patients, how to listen, how to communicate effectively, how to respect where they are and not force your own philosophy or faith onto them.

> You study, for instance, how to administer a cardiac patient versus oncology patients and the various kinds of crises of physical well-being and mental well-being that happen to people. You may do some specialized study in an area like oncology or chemical dependency, but it's a broad spectrum program where you study theological issues, you study psychological issues, philosophical issues, in a setting with your peers so that you get a lot of feedback on what you're doing.
>
> You also do verbatim accounts of conversations with patients, and you are helped by your peers and by your supervisor to understand perhaps where you are violating people's faith or their rights and learn to be very sensitive to the difference between my needs and the patient's needs and to really focus on the patient's needs. (Tr. 93, 94 and 95).[6]

Chaplain Rogers set out the philosophy of CPE as follows:

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[6]She testified that she had spent five three-month quarters in college, two on basic CPE and three on advanced or residency training (Tr. 93).

> The philosophy is we do not force your faith understanding on anyone. We do not proselytize, that is a violation of a person who is already in a fairly helpless condition, crisis situation, everything else is already up in the air. So you're very careful not to violate that person's human rights.
>
> You listen very carefully to their story, to their faith language, to the symbols that are important to them, and you help them find the resources of faith and the resources of their life whether that be family or their church or their faith or their own history, how have I gotten through hard situations before, and help them to find their own strengthening and own courage. To do anything else than that, according to the philosophy of CPE, is unconscionable. (Tr. 97).

Chaplain Rogers further commented on CPE as follows:

> Mr. Hartsook: How do you ensure that they do not try to proselytize the patients?
>
> Chaplain Rogers: . . . We are trained in the philosophy of pastoral care, which comes out of clinical pastoral care, which is that you do not try to proselytize anyone, but that you listen to the story of that person, you embrace their faith language, and

> you stick with them. You don't try to lead them anywhere. You can't try to change their ideas or their faith. (Tr. 41).

Chaplain Rogers stated that she and the volunteer chaplains were expected to and did adhere to CPE's concept of not proselytizing patients (Tr. 93-94). She also testified as to her extensive training in grief therapy for patients and their family members.

The services that Chaplain Rogers provides are available to all BMC patients, regardless of their income (Tr. 18) or reason for hospitalization. Her services are not billed directly to the patient. (Tr. 64). Chaplain Rogers and the few volunteer chaplains she supervises have had access to patients' medical records and admission data. (Tr. 19). This has

been done without securing advance approal of patients. "Most of the time when I read a chart, it's at the Sands [psychiatric] Unit where I've been asked to do a consultation and that person [patient] wants to continue to see me, and I want to understand their history a bit better so I can better help them" (Tr. 43), but she says, "I spend very little time reading medical charts." (Tr. 43). She explains that "when I am asked to consult with a patient or his family, I look at the records to get background on them so I can be of better service. If I learn something [about a patient], it is confidential." (Tr. 19). Patients are asked their religious preference when they are admitted to BMC, and their preference is noted on BMC's admission forms. (Tr.

19). Very often the religious preference given is "none", and it is not clear whether that means no denomination, that the patient does not attend church, or that the patient may be an atheist.

Chaplain Rogers encourages the Broadlawns staff and the volunteer chaplains to inform patients of her availability and encourages them to make referrals to her. (Tr. 34). The staff and volunteer chaplains refer her to a patient if they believe that seeing a chaplain would be helpful to the patient, even though no request for a chaplain has been made. Chaplain Rogers attempts to make rounds in the medical section of the hospital every day, but she does not make daily rounds in the psychiatric departments. "Some weeks I don't get over there

much at all because I'm busy in the medical section. Other weeks I'll spend maybe 30% to 50% of my time over there." (Tr. 24). "There is also a big need at Sands [psychiatric] so it's a balancing act." (Tr. 47). "I also have a lot of contact with patients who have alcohol and drug abuse problems." (Tr. 67).

Chaplain Rogers makes calls on patients prior to surgery, unless their surgeries begin before 8:00 a.m., the beginning of her work day. These pre-operative calls occur both before and after sedation, even though the patient has made no request to see her. (Tr. 14, 16). When Chaplain Rogers visits a patient, she normally asks if there is anything she can do for the patient. Approximately 40% of the time, the

patient's response is to ask her to say a prayer. (Tr. 16). If Chaplain Rogers already knows from a previous visit that prayer is meaningful to a person, she will ask them if she can say a prayer for them.

She summed up some of her activities as follows:

> I supply grief counseling, I help them to express their fears, cry, whatever. (Tr. 25).
>
> If I had to guess I would say 20 to 30% of my time is spent in religious activity, the rest of the time I'm listening to people. (Tr. 53-54).
>
> I focus on the patient's needs. . . .I have religious discussions only if they lead. (Tr. 71).
>
> I'm not trying to change their faith. (Tr. 51).
>
> I don't see how anyone could possibly say I'm anything but a servant. (Tr. 52).
>
> It would be terribly hard for me, Maggie, to try to instill my religious beliefs in a patient. (Tr. 60).

> I am part of the medical team, the healing team. Chaplain followup is important. (Tr. 68).

In the intensive care and surgery waiting rooms, she often drops in, introduces herself, and gets to know the family to see if there is anything she can do for them. (Tr. 26). These people cannot, under the circumstances--for example, a death-bed watch--leave the hospital to go and seek solace elsewhere. A similar situation arises in intensive care, where family can only go into the patient's room for a fifteen-minute period once every two hours.

> I am a liason between the families and the rest of the medical team. Medical doctors and psychiatrists sometimes call on me for consultation . . . for instance, when someone is dying there's all kinds of tension. For example, to resuscitate or not . . . the doctor asks me to find out what the patient and family think . . . .

> Psychiatrists also call on me for consultation . . . talk to that patient and get back to me and tell me what you think. I also act as a go between between the patients and their families regarding whether or not they want to be on life support machines for example. (Tr. 33-34).

Although religious discussions are usually not part of her conversations with families, family members sometimes ask her to pray or join them in prayer, which she will do. (Tr. 21).

The Court finds from the testimony of various witnesses and the exhibits that BMC's intent in hiring Maggie Rogers was to enhance the hospital's "wholistic" treatment approach. The record is clear that Chaplain Rogers does perform her duties consistent with the concept of Clinical Pastoral Education (CPE). The explanation of this concept demonstrates

that in this setting, the chaplain's function is not the traditional parish- or institutional-style ministry. Rather, its purpose is to address the needs of the individual patient, as defined by the patient, not the chaplain. Proselytization or any effort to impact religion or religious beliefs upon individuals who do not already have such beliefs is totally inconsistent with the CPE concept and is scrupulously avoided by Chaplain Rogers.

Chaplain Rogers also takes her turn with the volunteer chaplains in conducting Sunday services in the Nauraine conference room at BMC. (Tr. 44). This room contains a wooden cross and various hymnals marked with a BMC stamp. The Sunday services are Christian services which include a brief worship service, singing, prayer,

reading of Scripture, the chaplain's reflection on the Scripture, and a benediction. The time of the Sunday service is announced over the intercom at the hospital, and only those people wishing to attend do so, usually averaging fifteen to twenty people who are not able to leave BMC to attend outside Sunday services (Tr. 45-46). A parking space is provided near the hospital building for use by volunteer ministers. This space is also available to provide ready access for clergymen, not affiliated with BMC, but who are called in urgent situations. The Court finds no constitutional problems with these two situations. The Court finds that there is a basic need for the services of a chaplain at BMC and that the services provided by the chaplain are permissible

under the Free Exercise Clause.

Defendants called as witnesses a strong cross-section of Des Moines area health care professionals. These included Dr. Wooters, Chief Medical Officer of Polk County; Dr. Timothy Olson, Director of Psychiatry at BMC; and Dr. Barry Ingebritson, BMC Medical Director. Donald W. Dunn, President of the Iowa Hospital Association; Douglas Hart, BMC Trustee Chairman; three other Trustees, and paid chaplains from the Independence (Chaplain Hart) and Clarinda (Chaplain Englehardt) state hospitals also testified. Dr. Ingebritson is the Medical Director for BMC's Primary Care Unit. He opined that as a medical doctor, he is concerned with all health issues, and requires all possible tools to confront them. He

believes that a "wholistic" method should be applied to health care. He testified that four health issues must be addressed: (1) social, (2) emotional, (3) spiritual, and (4) bodily. Dr. Ingebritson uses the term "spiritual" rather than "religious" in the sense of belonging to any particular denomination. He testified that a chaplain is needed to treat the "spiritual" aspect, and that a person's health entails much more than mere medicine.

Dr. Timothy Olson is BMC's Directory of Psychiatry. He is also the head of the Sidney Sands Unit at BMC. He testified that at any given time, approximately one-third of the Sidney Sands patients are involuntarily committed, without freedom of movement. He further stated that less

than 25% of patients residing in the unit at any given point are able to leave the building on a pass. Dr. Olson testified that a full-time chaplain could provide secular and spiritual benefits to Sands [psychiatric] patients. He explained that psychiatric patients often need support benefit from the simple presence of and communication with a chaplain. He did stress the importance of the chaplain's adherence to CPE, noting that psychiatric patients can be very vulnerable to suggestions. He testified that BMC's psychiatric patients are "special", but "they can be very hard to handle; we need an experienced chaplain. Coordination with the doctors is important. We had some trouble with volunteer chaplains. Our problems are similar to Clarinda's,

but our patients are sicker, mostly indigent with no family support. The spiritual need is great, so I don't believe psychiatric social workers could do the job."

The consensus of these witnesses was that the chaplaincy was a fine program and that it was badly needed at BMC, not solely for religious services, but more importantly, to assist the doctors in their "wholistic" approach to medical care, and to provide grief therapy for family members.

Donald W. Dunn, President of the Iowa Hospital Association, testified that he was well acquainted with BMC and its mission and service. He said BMC was unique in Iowa, since it has a special charge to provide medical and psychiatric care of

the indigent. He testified further that BMC as operated by Polk County was the only county hospital that kept its psychiatric patients for treatment and did not send them to one of the state mental health institutes and that BMC's psychiatric unit operated much the same as the state hospitals in that its needs and mission were the same. Exhibits H, I, J, K, L, N and O each clearly conclude that the Iowa Veterans Home at Marshalltown and the state hospitals at Cherokee, Oakdale, Independence, Clarinda. Mt. Pleasant and Woodward all have tax paid chaplains.

BMC provides long-term, chronic psychiatric service, in-patient (shorter term) and out-patient psychiatric services and serves many chronic alcoholics (Tr. 67) at the detoxificiation center (Tr.

18). These services make its mission almost identical to Cherokee and the other mental health institutions. BMC, of course, had in addition a busy medical hospital and pediatric ward. Harold Templeman, the Deputy Director of the Iowa Department of Human Services, testified that he was responsible for the four state mental health facilities and that six chaplains were employed by these facilities. "They are part of our overall team." They provide important service. He further testified that BMC's psychiatric unit is comparable to our four facilities. "Counseling is our main job; the chaplains are a big plus."

The Court was impressed with the four BMC Trustees who testified. They each

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held responsible positions in the community, had been on the Trustee Board, by election, for a number of years, and were articulate in describing the dire need for the services the chaplain is performing. Board Chairman Douglas Hart, a Service Employees Union official, stated that he had given this situation very careful consideration, that he had been a former State Board member of the Iowa Civil Liberties Union, that he had contacted former counsel for that group and that both were persuaded that there were no real constitutional problems involved in light of the Free Exercise Clause.

Trustee Margaret Stout, an official of the Mental Health Association of Iowa, testified that there must be an ecumenical

person available, to follow up, to coordinate. "It's a locked facility; we need a chaplain."

Trustee William Dyar, Director of the Multiple Sclerosis Association of Iowa, stated, "I received many complaints that no ministers were available, that the volunteers who were at times available were too preachy. In my opinion, I am representing the people of Polk County and not just my own views."

Trustee John Ahern, a local real estate man, testified as follows: "We hired the best person available regardless of their faith, but I think it does take an extraordianry person to be able to handle a job such as she does and not carry their own personal feelings (regarding religion) where they shouldn't

go, so it takes a real strong person to administer a function like that. We've got a dynamite gal doing it."

Dr. R. C. Wooters, Polk County Chief Medical Examiner (formerly coroner), testified that he had many calls to BMC, that he handles all homicides, suicides and unattended deaths, that he has worked closely with the chaplain. "She is performing an outstanding service; she gives great support to me, the families and everyone involved. I am pleased with the arrangement. I'm not worried about any constitutional problems; this is a necessity."

Each Trustee testified that the hiring of a chaplain was not done to harass or confront Larry Carter; they said it was not in any manner directed to Mr. Carter,

and each had complimentary things to say about Carter.

Plaintiff John Doe, now identified as Dr. Maurice LaBelle, is a professor of literature at Drake University in Des Moines, Iowa. He has been a Polk County resident for the past sixteen years. He pays income tax to the State of Iowa and to the United States government. He is an atheist. His definition of an atheist is simply that of a person who does not believe there is a god, deity or supreme being. The presence of a tax-paid chaplain at BMC deters LaBelle from using BMC for medical care and caused him to go to another Des Moines hospital for treatment instead of BMC. LaBelle does not believe that religion should be mixed with medicine and does not want a chaplain to

view his medical records. He believes he is entitled to have BMC, a tax-supported hospital, free of religious activity.

Plaintiff Larry Carter is an atheist. He is also the father of Courtney Carter, an 11-year old minor female. Both Carters have received medical care at BMC in the recent past, and it is their hospital of choice in Des Moines. Larry Carter works only part-time and receives government benefits in the form of Aid to Dependent Children and food stamps. He is normally indigent and unable to pay the entire cost of his medical care. When eligible, Title XIX pays for the Carters' medical care at BMC. When ineligible for Title XIX benefits, he receives free or reduced fee care at BMC. The presence of a

government-paid chaplain at BMC is offensive to Carter and makes him unwilling to use BMC for the medical care of himself or his daughter. He is fearful that religion will affect his medical care. Carter is a taxpayer to the State of Iowa and to the United States government. He is a long-time resident of Polk County, and at least a portion of his rent goes to pay property taxes used to support BMC.

As a member of the Citizens Advisory Board for Primary Care at BMC, Carter has taken a public position against the hiring of a chaplain, the use of the conference room for religious sevices, and the designation of parking spaces for chaplains. The effectiveness of Carter as an Advisory Board member has been affected, he says, by the hiring of the

chaplain in that his personal relationships with the Board of Trustees, other Advisory Board members, and BMC staff have deteriorated.

As a result of Carter's actions in publicly opposing the hiring of a chaplain, his former friends have shunned him. However, he made it clear that the defendants here had not harassed him. He has testified he suffered great anxiety and emotional distress because of his fear that he or his daughter will have to go to BMC for treatment where a tax-funded chaplain is employed. He contends that his part-time employment with a local newspaper was terminated as a result of his activism in seeking to block the employment of a chaplain. The Court makes no finding concerning this contention.

The newspaper is not a party to these proceedings.

Carter fears that he will be subjected to religious services at BMC when he is both conscious and unconscious. The Court finds that his fears are unfounded, based on the CPE methods employed by Chaplain Rogers and the volunteer chaplains. The Court specifically finds that there was no competent evidence submitted to persuade the Court that there was and is a conspiracy against atheists and the plaintiffs in relation to this hiring. Atheism and the plaintiffs were clearly not a factor in the hiring. Carter believes that it is "medical malpractice" for BMC to employ a paid chaplain and to allow the chaplain to be a part of the medical team. The Court cannot agree that it is "medical

malpractice" to employ the chaplain as she is now employed, and the Court is persuaded that the plaintiffs and all atheists will be safe from any unwanted contact with the chaplain or any of the volunteers.

The Court also heard evidence concerning the finances of BMC. The Court heard the testimony of Gary Uhl, Financial Director of BMC, and received certain financial statements into evidence. The Court finds that there are not sufficient funds donated privately year in and year out to fund the chaplaincy position. Absent private donations that have not been forthcoming, the only methods for funding the chaplaincy program are receipts from patient billings, the cafeteria and tax appropriations, which

constitute about one-third of the total. All moneys received are commingled. This Court does not believe it would be appropriate, or solve any constitutional problems, if only money from the cafeteria or patients' billings were used to fund the chaplain position.

CONCLUSIONS OF LAW

A. Jurisdiction.

This is a civil rights action brought against 42 U.S.C. §§1983 and 1985. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1343, and venue is proper under 28 U.S.C. § 1391. BMC is clearly a proper defendant under § 1983. Since limited injunctive relief in favor of the plaintiffs is entered against BMC only, it is not necessary for the Court to

determine whether plaintiffs' claims under § 1985 are cognizable.

B. Motion to Dismiss - Standing.

The defendants moved to dismiss, arguing that the plaintiffs did not have standing to maintain this lawsuit. With regard to the standing of plaintiffs to maintain this lawsuit on behalf of others, a stipulation of dismissal was filed on December 27, 1985 by which the American Atheists and Jane Roe dismissed their claims against the defendants. Plaintiff LaBelle has participated as a plaintiff throughout the proceedings, and at the commencement of the trial of this matter, the caption of the case was changed to designate plaintiffs Larry Henry Carter, Courtney Demaris Carter and Maurice

LaBelle. The Carters and Professor LaBelle have standing as taxpayers to challenge the alleged unconstitutional spending of tax moneys in violation of the Establishment Clause of the First Amendment. *Flast v. Cohen*, 392 U.S. 83, 102-05 (1968); *Grand Rapids v. Ball*, 53 U.S.L.W. 5006, 5007 n.5, 105 S.Ct. 3216, 3221 (1985). The defendants' motion to dismiss on the basis of standing is therefore denied.[7]

C. Establishment Clause.

The Establishment and Free Exercise Clauses to the U.S. Constitution state:

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[7]Plaintiffs offered 56 exhibits. The defendants objected to many of these exhibits as being irrelevant and immaterial. Although the Court believes that some of these exhibits have only limited relevance to the issues involved, the Court rules that all plaintiffs' exhibits, 1 through 56, are admitted.

> Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof....

The Establishment Clause applies to the states and their municipalities through the Due Process Clause of the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1, 8 (1947). The constraints of the Establishment Clause apply to both legislative enactments and other governmental activities. *Voswinkel v. City of Charlotte*, 495 F.Supp. 588, 594 (W.D.N.C. 1980); *see also Lynch v. Donnelly*, 465 U.S. 668, 675 (1984).

The Supreme Court has set forth a three-part analysis utilized in determining whether a government act passes muster under the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Committee for Public Education v.*

Nyquist, 413 U.S. 756, 772-73 (1973). In *Nyquist*, the Supreme Court stated the three-part analysis as follows:

> [T]o pass muster under the establishment clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid escessive government entanglement with religion.

Id. at 773 (citations omitted). In construing the Establishment Clause, the Court must strike a balance between the basic mandate of the separation of church and state and the free exercise of religion. In this regard, the Supreme Court stated:

> "It has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 760 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates

> accommodation, not merely tolerance of all religions, and forbids hostility toward any. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211 (1948). Anything less would require the "callous indifference" we have said was never intended by the establishment clause. *Zorach, supra*, 343 U.S. at 314. Instead, we have observed, such hostility would bring us into "war with our national tradition as embodied in the first amendment guarantee of the free exercise of religion." *McCollum, supra*, 333 U.S. at 211, 212.

Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

This Court applied the *Lemon/Nyquist* test in its order entered September 9, 1985 denying a preliminary injunction. In that order, this Court expressed doubt concerning whether a tax-supported chaplain at a county hospital withstood two of the three *Lemon/Nyquist* elements. (Order of September 9, 1985, pp. 8-9), No.

32 in the Clerk's Memorandum of Papers). As the Court has now fully heard the evidence presented by both sides, further elaboration on the *Lemon/Nyquist* test is in order.

Initially, the Court notes that the *Lemon/Nyquist* test is not a mandatory analysis in Establishment Clause cases. As the Supreme Court noted in *Lynch v. Donnelly, supra,* at 679, "We have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." For example, in *Marsh v. Chambers,* 463 U.S. 783 (1983), the Supreme Court upheld the State of Nebraska's practice in opening each legislative session with a prayer by a chaplain paid with tax revenues. Rather than employ the *Lemon/Nyquist* test, the

Court affirmed this practice relying on a 200-year tradition of commencing legislative sessions with prayer. *Id.* at 792. However, in the instant case, the evidence disclosed no such long-time tradition in hiring tax-paid chaplains at county hospitals. Therefore, for want of a better analysis, this Court will examine BMC's chaplain utilizing the *Lemon/Nyquist* test.

The first element in this analysis in relation to the Establishment Clause only requires that the practice must reflect a clearly secular purpose. This does not mean that the challenged activities' purpose be exclusively secular. "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation that this court has approved in the past would have been

invalidated." *Lynch, supra,* at 681. Thus, the issue is whether BMC's chaplain has a clearly secular purpose.

The Court recognizes that Chaplain Rogers fulfills some secular duties at the hospital, including grief counseling and other secular patient counseling. The Court believes that it is a close question whether her purpose is clearly secular. The principles of CPE appear to indicate that a person's "spiritual needs" do not necessarily mean "religious needs". Also, Chaplain Rogers and the few volunteer chaplains strictly adhere to the CPE concept of non-proselytization. However, after careful consideration of all the evidence and testimony in relation to the Establishment Clause, the Court concludes that the chaplain's position is

not clearly secular. One of its main purposes is to meet the religious needs of patients.

The Second Circuit reached a similar conclusion in *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), where it considered an Establishment Clause challenge to army chaplains:

> If the current army chaplaincy were viewed in isolation, there could be little doubt that it would fail to meet the *Lemon v. Kurtzman* conditions. Although the ultimate objective of the chaplaincy may be secular in the sense that it seeks to maintain the efficiency of the army by improving the morale of our military personnel, its immediate purpose is to promote religion by making it available, albeit on a voluntary basis, to our armed forces.

Id. at 232 (emphasis added). Thus, while the BMC chaplain is available on a voluntary basis and does not proselytize or "push" religion on patients, the immediate

purpose is to provide religion to patients who clearly want it.

The Court turns next to the second element of the *Lemon/Nyquist* test, which states that the activity "must have a primary effect that neither advances nor inhibits religion." *Nyquist, supra,* 413 U.S. at 773. In *Lynch v. Donnelly,* 465. U.S. 668, 683 (1984), the Supreme Court noted that its prior decisions clearly recognize that some advancement of religion will necessarily result from governmental action. The issue in the case at bar is whether the chaplaincy provides merely an "incidental advancement" of religion. The Court concludes that it does not. The Court has already found that the BMC chaplain lacks a clearly secular purpose. Paying a chaplain to

provide religious care (while not the chaplain's only duty), is an advancement of religion. The fact that Chaplain Rogers abides by CPE concepts makes the advancement more tolerable, but does not eradicate it.

The third element of the *Lemon/ Nyquist* test test is that the activity avoid excessive government entanglement with religion. Chaplain Rogers, while she may at times coordinate her hospital rounds with BMC administrators, does not take direction from them as to how she is to counsel patients. Also, her CPE training and her adherance to CPE concepts indicate that the hospital administration would not be required to monitor her every move to ensure that she was not prosely-tizing patients. The Court finds that the

evidence demonstrates no excessive entanglement.

However, given the fact that BMC's hiring of a chaplain fails two of the three *Lemon/Nyquist* elements, it is clear that the Establishment Clause will only permit the hiring of a paid hospital chaplain if it fits within an exception to its general prohibitions. The Court now considers the issue of whether the hiring is permissible under the Free Exercise Clause.

D. Free Exercise Clause.

As the Second Circuit noted in *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985):

> The establishment clause must in any event be interpreted to accommodate other equally valid provisions of the Constitution, including the free exercise clause, when they are implicated.

Id. at 233 (citations omitted). Thus,

even though this Court has found that a tax-paid chaplain fails to pass the *Lemon/Nyquist* test, the prohibition embodied in that test is not absolute, and the Court must consider whether the practice is justifiable as an implementation of the Free Exercise Clause.

Although plaintiffs have maintained that this action does not involve the Free Exercise Clause, the Court finds that, factually, the prohibition of a chaplain would directly impact upon the opportunity which BMC patients have to freely exercise their chosen religious beliefs. Initially, it is interest to note that the BMC Board of Trustees requested an opinion from the Polk County Attorney as to the constitutionality of hiring a chaplain. Defendants' Exhibit A is an opinion from

the Polk County Attorney informing BMC that it is not unconstitutional to employ a chaplain. The opinion states in part:

> The Trustees are authorized to do all things necessary for management of the Medical Center unless such authority is specifically denied by Chapter 347 of the Code. Nothing in Chapter 347 denies the Medical Center the right to hire a chaplain. The Medical Center is authorized to do so.

(Defendants' Exhibit A). The opinion then mentions the Free Exercise Clause and Article I, §3, of the Iowa Constitution, which also contains the Free Exercise Clause. The opinion then favorably cites *Rudd v. Ray*, 248 N.W. 2d 125 (Iowa 1976), where the Iowa Supreme Court upheld Iowa's practice of paying chaplains to serve the Iowa State Penitentiary. *Id.* at 129.

The situation at BMC is comparable to facts in *Katcoff, supra*, at 233, at *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986), and

Rudd v. Ray, supra. In *Katcoff*, the court upheld the practice of army chaplains, reasoning that as soldiers were often required to live in areas where their own religious denomination was not available to them, to prohibit a chaplain would violate a soldier's right under the Establishment Clause not to have religion inhibited and his right under the Free Exercise Clause to practice his freely chosen religion. *Id.* at 234. In *Baz*, the Seventh Circuit stated that a chaplain may well be necessary at a VA hospital so to accommodate the Free Exercise Clause. 782 F.2d at 709. As previously stated, the Iowa Supreme Court in *Rudd* upheld Iowa's practice of paying chaplains to serve the Iowa State Penitentiary. 248 N.W.2d at 129. The court reasoned that because of

the restraints placed on prisoners, a prison chaplain was permissible to guarantee prisoners' free exercise rights. *Id.*

Polk County does not generally "confine" patients at BMC in the same manner as prisoners in penal institutions or as the army assigns its members to particular posts.[8] Plaintiffs' contend that hospital patients are not in the same situation as prisoners and that *Rudd* therefore does not apply. Plaintiffs assert that in contrast to prisoners, Broadlawns' patients are not confined by the government and they may leave at any time. While this argument has some

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[8]However, the testimony did demonstrate that at least one-third of the patients at BMC's Sidney Sands Unit are involuntarily committed.

attraction, it is not grounded in reality.

Few people confined to a hospital may leave at any time. Most patients' mobility is severely restricted due to their health, a condition patients have little control over. Also, BMC psychiatric patients are confined for the most part, and those who are "free" to leave may do so only if they obtain a pass. Further, BMC treats many indigents who have no other hospitalization alternatives. An indigent's freedom to leave the hospital is limited by both his health and his ability to secure medical care elsewhere. Plaintiffs contend that the county could pay for medical services at a private religiously sponsored hospital for those indigent patients who desire religious services. However, this would also result

in an indirect contribution to religion and would be fraught with many of the same problems that the plaintiffs now perceive in the hiring of a tax-paid chaplain at BMC. Therefore, the Court finds that the fact that the county government does not place or confine all the patients at BMC[9] has little relevance, and does not ultimately distinguish the facts of this case from the holdings in *Katcoff*, *Baz* and *Rudd*.

This Court is not only persuaded that the Iowa Supreme Court correctly decided *Rudd*, but that the citation in *Rudd* to Justice Brennan's concurring opinion in

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[9]Polk County sends both occasional prisoners, alcoholics and those with medical and mental both long- and short-term problems to BMC. Others are referred by physicians or just show up for admittance.

School District of Abington Township v. Schepp, 374 U.S. 208 (1963), expresses the ultimate legal conclusion pertaining to the free exercise interest of patients at BMC:

> There are certain practices, conceivably violative of the establishment clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the establishment clause, yet be sustained on constitutional grounds as necessary to secure to the members of the armed forces and prisoners those rights of worship guaranteed under the free exercise clause.

Id. at 296-99 (footnotes omitted).

Therefore, the Court finds that the

hiring of a tax-paid chaplain at BMC, like the hiring of a military chaplain or a prison chaplain, is constitutional under the Free Exercise Clause. For similar reasons, the Court concludes that it is also constitutional for BMC to permit religious services and artifacts in the Nauraine conference room and to provide a reserved parking space close to the hospital for visiting ministers as a necessary incident to the provision for a chaplain. Further, the Court finds that there is no constitutional infirmity with either the paid chaplain or volunteer chaplains making patient rounds so long as the principles of CPE are followed. While Maggie Rogers wears a name tag indicating she is the "BMC Chaplain" (Tr. 11) and is referred to by all as a "chaplain," the

Court finds that the title in and of itself is not objectionable. She is not the stereotype of one's usual image of a "chaplain." She is an unordained female who does not view her primary focus as religious. The Court finds that what her title is does not automatically foreclose her from acting by constitutional edict. The Court also finds that the use of name tags which identify the chaplains are not a constitutional violation. Restrictions on the voluntary wearing of identification tags by hospital chaplains could implicate First Amendment free speech protection. *See, e.g., Tinker v. Des Moines School Dist.*, 393 U.S. 503, 505-06 (1968). The Court also finds that the religious preference question on BMC's admission forms is permissible, as long as religious pre-

ference is not a prerequisite to admission. The evidence clearly demonstrates that it was not.

While the Court finds that the BMC chaplain is constititional under the Free Exercise Clause, the chaplain's activities should not be unrestricted. The Seventh Circuit in *Baz v. Walters, supra,* addressed the constitutional tightrope such as the one on which BMC has embarked:

> [T]he VA must must ensure that the existence of a chaplaincy does not create establishment clause problems. Unleashing a government-paid chaplain who sees his primary role as proselytizing upon a captive audience of patients could do exactly that. The VA has established rules and regulations to ensure that those patients who do not wish to entertain a chaplain's ministry need not be exposed to it.

782 F.2d at 709. Chaplain Rogers abides by the principles of CPE as outlined in this Court's Findings of Fact. She has

not assumed the role of proselytizing, and BMC should not allow it. The Court concludes that a government-paid chaplain at BMC who used coercive methods to forcefully expose patients to religious doctrine would contravene the Establishment Clause, *Baz, supra,* 782 F.2d at 709, and would contravene the Free Exercise Clause. *Campbell v. Cauthron,* 623 F. 2d 503, 509 (8th Cir. 1980). Since the employment of a paid hospital chaplain abiding by the CPE principles explained at trial is consistent with ensuring a patient's free exercise interests, the Court concludes that it is not unconstitutional for BMC to employ a chaplain who performs as Maggie Alzeno Rogers does at BMC.

This decision, however, is limited to

providing religious and grief counseling service to inpatients only. She may provide grief counseling services to families that are at the hospital and for all practical purposes not free to leave because a loved one is in a life-death situation. Chaplain Rogers testified that some of her religious counsel was extended to employees (Tr. 29), families of patients, and outpatients.[9] The Free Exercise interests of these three classifications--employees, families (exclusive of those mentioned above) and outpatients--are not implicated since they are free to leave the institution and procure religious

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[9]This counseling now relates in part, at least to the duties of these employees in life-or-death situations with all the stress and grief involved therein. Thus, as much as it may be desirable, it cannot be allowed in this setting.

counsel elsewhere. *See, e.g., Voswinkle, supra,* 495 F.Supp. 588. Thus, relief for the defendants is granted subject to a restriction against the chaplain's providing religious counsel to employees, patients' families (except as set out above) and outpatients.

The Court also concludes that the policy of chaplains having open access to patient medical records is constitutionally infirm under the Fourteenth Amendment. Patients at BMC have a right of privacy founded on the Fourteenth Amendment's concept of personal liberty. *Whalen v. Roe,* 429 U.S. 589, 599 n.23 (1977), *citing Roe v. Wade,* 410 U.S. 113, 152-53 (1973). One facet of the right of privacy "is the right of an individual not to have his private affairs made public by

the government." *Whalen, supra,* 429 U.S. at 599 n.24, *quoting* Kurland, *The Private I,* The University of Chicago Magazine 7, 8 (Autumn 1976). In *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976), the Supreme Court refused to strike down record-keeping and reporting requirements regarding abortions that were (1) reasonably directed to the preservation of maternal health and which (2) properly respect a patient's confidentiality and privacy. *Id.* at 80. In allowing chaplains free access to medical records, BMC is not properly respecting a patient's confidentiality and privacy. The Court concludes that patient medical records can only be accessed by a chaplain upon prior express approval of the individual patient or his guardian. This will not be so

broad as to bar doctors, medical and psychiatric professionals and nurses to provide to the chaplain basic information, not privileged, which would enable the chaplain to understand what the patient's basic problem was, e.g., a suicide attempt. The Court shall enter injunctive relief regarding this violation. However, the plaintiffs have not shown that their privacy rights have been personally violated in this regard and, thus, the Court will not award any damages.

CONCLUSION

This order should not be read as setting a general precedent for the hiring of paid chaplains in state or county institutions. Each such situation must be

determined on its particular facts.[10] The result here is limited only to a situation such as exists at BMC. The factors the Court has specifically relied on in permitting the hiring of a chaplain are as follows. BMC has a relatively large psychiatric patient population which is essentially "locked down." This population includes involuntary commitments. In general, the psychiatric population is not

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[10]This decision should not be read as a finding that publicly owned hospitals are required by the Constitution to provide chaplains to patients. Although the Court holds that BMC's use of a chaplain is permissible as a means of ensuring patients' free exercise rights, a different question would be posed if the hospital did not have a paid chaplain and a patient sued to compel the hospital to provide one. The fact that a right is constitutionally protected does not automatically authorize the Court to compel governments to remove obstacles to the full exercise of that right. *Harris v. McRae*, 448 U.S. 297, 316 (1980); *Rudd v. Ray*, *supra*, at 133.

free to leave to procure religious counseling or services elsewhere. This is also true of alcoholics and patients in the chemical dependency unit and occasional prisoners sent to BMC. The medical patients at Broadlawns are generally unable to procure religious service elsewhere due to their health. Patients at BMC are in large measure indigent and generally unable to procure treatment at some other institution that has religious facilities. The non-proselytizing principles of CPE are followed by the BMC chaplain. There has been a demonstrated demand for "wholistic" health care involving the social, emotional, spiritual and bodily well-being of the patients that has not reasonably been met by the volunteer service of chaplains, despite

repeated efforts toward securing volunteers. The Court therefore concludes that the hiring of a chaplain is constitutional under the Free Exercise Clause.

IT IS THEREFORE ORDERED that plaintiffs' prayers for declaratory and injunctive relief regarding the hiring and continued employment of a paid chaplain at Broadlawns Medical Center are hereby denied.

IT IS FURTHER ORDERED that Chaplain Maggie Rogers and any successor to her as paid chaplain at Broadlawns Medical Center are enjoined from counseling of employees, families of patients where the patient is not in a life-death situation, and outpatients.

IT IS FURTHER ORDERED that Broadlawns Medical Center is hereby enjoined from

permitting chaplains' access to patient medical records absent express consent from the patient, his or her guardian or next of kin.

IT IS FURTHER ORDERED that plaintiffs' prayer for an award of compensatory damages is hereby denied.

IT IS FURTHER ORDERED that counsel for the plaintiffs shall submit a short brief within fifteen days concerning whether plaintiffs are entitled to an award of attorney fees as a partially prevailing party on some of the issues set out herein pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The brief shall be accompanied by an affidavit itemizing the time spent on this case and an hourly rate reasonable for the community. Counsel for

the defendants shall file a reply brief within fourteen days from the date of the filing of the plaintiffs' brief.

July 9th, 1987.

/s/ Donald E. O'Brien
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

IV. DISTRICT COURT'S ORDER DENYING PRELIMINARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

AMERICAN ATHEISTS, et al., Plaintiffs, vs. BROADLAWNS MEDICAL CENTER, et al., Defendants.	CIVIL NO. 84-800-E ORDER Entered September 9, 1985

This matter comes before the Court on a motion for an emergency restraining order filed by plaintiffs. Plantiffs seek an order restraining Broadlawns Medical Center, which is the Polk County Hospital, from spending public funds of $1,250.00 for the search for a chaplain for Broadlawns Medical Center, who would be paid a salary of $18,000.00 to $23,000.00 per annum. Three hearings on plaintiffs'

request for an emergency restraining order were held at which evidence was taken. Counsel appeared at each hearing on behalf of the defendants; Larry Carter appeared pro se on behalf of all plaintiffs for the first two hearings, and thereafter counsel for plaintiffs submitted a brief and entered an appearance at the last hearing. On August 2, 1985, the parties filed a joint stipulation of evidence which had been requested by the Court at the last hearing. The Court will treat plaintiffs' motion for an emergency restraining order as a motion for a preliminary injunction under Rule 65, Fed.R.Civ.P. Plaintiffs' motion for injunctive relief is denied at this time.

MATERIAL FACTS

Broadlawns Medical Center is a county

public hospital located in Polk County, Iowa. It is funded by the taxpayers of Polk County, Iowa, and is governed and controlled by a Board of Trustees elected by the voters of Polk County, Iowa, pursuant to Iowa Code §347.9. The hospital also receives numerous monetary grants from the State of Iowa and from the United States.

At their June 1984 meeting, the Board of Trustees of Broadlawns Medical Center granted approval for funding a chaplain position. (Defendants' Exhibit B). Until now, Broadlawns Medical Center has relied on the services of volunteer chaplains to provide spiritual and pastoral care to patients. Because it has become increasingly difficult for Broadlawns to secure the services of volunteer chaplains, the

Board of Trustees decided to employ and pay a fulltime chaplain to provide religious services. At the October 9, 1984 meeting of the Board of Trustees, the Board approved a motion to enlist the services of Defendant Iowa Interchurch Agency for Peace and Justice (Agency) and authorized it to search for a chaplain for Broadlawns for a $250.00 service fee with other costs limited to $1,000.00 (Exhibit C, p. 6).

Plaintiff Larry Carter has received medical care in the past from Broadlawns Medical Center. He works only part-time and receives government benefits in the form of Aid to Dependent Children (ADC) and food stamps. He is proceeding in forma pauperis here. He is indigent and

Board of Trustees decided to employ and pay a fulltime chaplain to provide religious services. At the October 9, 1984 meeting of the Board of Trustees, the Board approved a motion to enlist the services of Defendant Iowa Interchurch Agency for Peace and Justice (Agency) and authorized it to search for a chaplain for Broadlawns for a $250.00 service fee with other costs limited to $1,000.00 (Exhibit C, p. 6).

Plaintiff Larry Carter has received medical care in the past from Broadlawns Medical Center. He works only part-time and receives government benefits in the form of Aid to Dependent Children (ADC) and food stamps. He is proceeding in forma pauperis here. He is indigent and

unable to pay the entire cost of his medical care, and when eligible, submits Title XIX documents to receive necessary medical care at Broadlawns.

Plaintiff Carter also sits on a citizens' advisory Board for Broadlawns. The advisory board provides citizen input into the operations of Broadlawns. As an advisory Board member, Plaintiff Carter has taken a public position against the hiring of a chaplain at Broadlawns Medical Center. Standing of the Plaintiff Carter has not been questioned.

Plaintiff Carter also heads the local chapter of the American Atheists, an organization dedicated to the absolute separation of church and state. Plaintiff contends that since becoming involved in the chaplain issue, the controversy has cost

his organization new dues-paying members.

Before the paid chaplain issue arose, plaintiff had generally good relations with the Board of Trustees, advisory board members and physicians on the staff of the hospital. As a result of his public involvement in this issue, his relationship with these persons has deteriorated; former friends have shunned him because of his involvement. Plaintiff testified that he considers it to be medical malpractice for Broadlawns to employ a paid chaplain. No testimony, however, was presented to support this personal belief.

It is undisputed that as a county hospital, Broadlawns serves patients who are wards of local law enforcement authorities and offered treatment only at Broadlawns. Further, Broadlawns also

serves indigents who are unable to secure medical help elsewhere. The testimony revealed that the University of Iowa has a chaplain paid from Medical School Funds. All three Veterans Administration hospitals in Iowa have paid chaplains, as do all State of Iowa hospitals and two state hospital schools, and so do the Fort Madison, Anamosa and Mitchelville, Iowa prison facilities.

After the first two hearings on this matter, Mr. Hartsook entered an appearance as counsel for plaintiff. He has argued that defendant should be enjoined from hiring a chaplain because to do so would violate the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSIONS OF LAW

Whether a preliminary injunction should issue involves the consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). The movant must make a requisite showing of a threat of irreparable harm. If a sufficient threat of irreparable harm is shown, the Court should then proceed to balance the remaining three factors. The basic question is whether or not the

balance of entities so favors the movant that justice requires the Court to intervene to preserve the status quo until the merits are determined. *Id.*[1]

1. Threat of Irreparable Harm.

The Plaintiff Carter as a pro se litigant prolonged resolution of this matter because he was anxious to testify about the personal changes in his life since

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[1]Plaintiffs bring this action under 42 U.S.C. §1985(3). In *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971), the Supreme Court set forth the elements necessary to state a cause of action under 42 U.S.C. §1985(3). There is an issue of whether §1985(3), as construed in *Griffin*, provides a remedy for the deprivation of the constitutional rights which plaintiffs allege here. The Court need not reach this issue in order to determine whether or not a preliminary injunction should issue.

this suit was filed.[2]

Since counsel has appeared for the plaintiffs, they now contend that the search for and employment of a chaplain at Broadlawns Medical Center paid from public funds will violate plaintiffs' First Amendment rights under the Establishment Clause of the First Amendment as applied through the Fourteenth Amendment to the

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[2]There is no question that Plaintiff Carter's public position against hiring of a chaplain has caused him social problems. He testified that his public involvement has cost his chapter of the American Atheists recruitment of new members and that former friends have shunned him. The injury Plaintiff Carter focused his testimony on was caused because he voluntarily injected himself into the public arena through the exercise of his First Amendment right to publicly speak. While Plaintiff Carter may have been subject to public ridicule, this came as a result of taking a controversial public position, and is not the type of harm for which an injunction against hiring a chaplain should issue.

United States Constitution. The deprivation of a fundamental constitutional right would support the finding of irreparable injury. *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1970); 11 C. Wright and A. Miller, *Federal Practice and Procedure*, §2948 at 440 (1973), and cases cited therein. The legal question which plaintiff presents appears to be novel. While there is as yet no clear showing that plaintiff's constitutional rights would be violated by the expenditure of public funds for employment of a chaplain, the Court concludes that plaintiff has shown the requisite "threat" of irreparable harm based upon the threatened deprivation of a constitutional right, and will therefore analyze the remaining factors.

2. Balance of Harm.

Plaintiffs contend that the irreparable harm that would occur if an injunction were not granted is that their constitutional rights would be violated. The Court concludes that plaintiffs would suffer serious harm if the defendants are not enjoined and it is later determined that the hiring of a chaplain at a public hospital under the circumstances here is a constitutional deprivation.

Constitutional considerations are, however, relevant to both sides of the chaplain issue. The Board of Trustees has determined that chaplain service must be provided more promptly and regularly than is done currently under the volunteer program. If the volunteer chaplain program at a public hospital is not fulfill-

ing the needs of the patients at Broadlawns, then the patients' interests under the Free Exercise Clause of the First Amendment may be impacted. Thus, given the constitutional considerations on both sides of the chaplain issue, there is a potential for harm to both plaintiffs and patients. The plaintiffs have not met the burden of showing that the balance of harm weighs heaviest against them in the event Broadlawns were permitted to hire a chaplain.

The Court turns next to the evaluation of the pivotal factor in this case, the probability of plaintiffs succeeding on the merits.

3. Probability of Success on the Merits.

In analyzing the probability of success on the merits, it bears repeating

that the issue raised is novel, and that neither the Court nor the parties have located other cases directly on point.[3] However, a number of cases have determined the constitutionality of hiring paid chaplains in other contexts. Without finally deciding the issue, based on the facts before the Court at this time, the Court concludes that defendants are more likely than plaintiffs to succeed on the merits.

The Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution state:

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[3] The pleadings and the evidence reveal only one challenge to the paid chaplain situation in Iowa as set out on page 11, infra. That is that the Iowa Supreme Court permitted a paid chaplain at the Iowa State Penitentiary. That case will be discussed later in this order.

> "Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof. . . .

A commonly cited formulation of prevailing Establishment Clause doctrine is the three-part analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) and *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-73 (1973). In *Nyquist* the Supreme Court stated the three-part analysis as follows:

> [T]o pass muster under the establishment clause the law in question, first, must reflect clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion.

Id., at 773 (citations omitted).

The defendants contend that they have satisfied all three prongs of the

Lemon-Nyquist test[4] and that therefore they should be permitted to hire a chaplain. The plaintiffs contend that the defendants have not met the tests required in any respect. The Court believes that a discussion of the issue generated by the three prongs set out above is in order.

Under the first prong, the defendants concede that the purpose of hiring a chaplain is to accommodate the religious needs of patients confined to Broadlawns. Defendants contend, however, that "a secular legislative purpose is clear--certain patients feel the need for religious counseling as a part of their medical treat-

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[4]In discussing this test, it should be remembered that it pertains to enacted laws and it is clear that there is no law involved here. The elected Hospital trustees have granted approval for the hiring. There is government "activity" as contemplated by *Lynch v. Donnelly*, 104 S.Ct. 1355, 1362 (1984).

ment to help develop an attitude which enables the patient to accept or tolerate an illness or particular medical condition." (Brief of the Defendants, p. 11). The Court is not fully convinced at this time that the hiring of a chaplain fulfills a secular purpose and can find no case law which supports the position that a government paid chaplain fulfills a secular purpose.

Under the second prong, defendants contend that the primary effect does not advance any particular religion or religious belief, nor does the hiring of a chaplain inhibit any person from exercising religious preferences or refraining from participation in same.

What defendants contend here may be true; however, the three-prong analysis

applies to provisions giving a uniform benefit to all religions. *Larson v. Valente*, 456 U.S. 228, 252 (1982). The fact that the hiring of a chaplain is not meant to advance any particular religion or religious belief is not probative of whether it has a primary effect which in general advances religion. Based on the record so far, it appears that the hiring will have a primary effect that advances religion.[5]

Under the third prong of *Lemon-Nyquist*, defendants contend that there is "no excessive government entanglement with religion" because rather than soliciting the services of clergy from local churches, Broadlawns will be able to avoid

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[5]For a job description of the chaplain's proposed duties, see Exhibit E.

making frequent requests for services as one hired chaplain will perform requested services within specific limited guidelines. They assert that if any patient desires other services, said patient will be free to seek said services and the defendants will not need to be further involved.

While counsel for Broadlawns makes the above argument, it has not been fully developed in the evidence as to how the desired services will be more readily available if sick patients must in the future seek their chosen services themselves. The parties have not addressed themselves to the future viability and administration of the volunteer chaplain program assuming the Board of Trustees follows through on the plan to hire a

chaplain. However, this is an issue which should be considered before the Court makes a final ruling on this matter.

This Court is not unmindful that one federal court applying the three-part analysis has determined that a contract between a city and a church providing that the church would provide the services of a "fulltime police chaplain" violated the Establishment Clause. *Voswinkel v. City of Charlotte*, 495 F.Supp. 588 (W.D.N.C. 1980). However, the Supreme Court has rejected an absolutist approach in applying the Establishment Clause. It has recognized that the Establishment Clause calls for the line drawing and that no fixed per se rule can be framed. In *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984), rehearing denied, 104 S. Ct. 2376 (1984),

the Supreme Court stated: "The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke, a phrase or test. The Clause erects a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Id., at 1362.

Thus, while the three-part test set forth in *Lemon* and *Nyquist* is the most frequently applied analysis in Establishment Clause cases, in two recent cases the court did not even apply the *Lemon-Nyquist* test. See *Larson v. Valente, supra; Marsh v. Chambers*, 463 U.S. 683 (1983). In *Larson*, there was substantial evidence of overt discrimination against a particular church. The

court stated that the three-part analysis was meant to apply to provisions giving a uniform benefit to all religions, and not to provisions which discriminate among religions. *Larson*, supra, 456 U.S. at 252.

In Marsh, the court determined that the practice of opening state legislative sessions with prayer by a paid legislative chaplain did not violate the Establishment Clause. This decision was, in large part, based on the historic practice started by the Congress in 1789 which agreed to enact the Bill of Rights and the First Amendment contained therein. The fact that the first Congress authorized the appointment of paid legislative chaplains to conduct opening prayers and that this practice has

continued unbroken ever since were important considerations in permitting a paid legislative chaplain. Marsh, supra, 463 U.S. at 786-92. The Supreme Court believed it would be incongruous to interpret the Establishment Clause as imposing more stringent First Amendment limits on states than the draftsmen imposed on the federal government. Id. Later, in Lynch, the Supreme Court explained that in Marsh it did not consider the traditional Lemon-Nyquist three-part analysis to be relevant. Lynch, supra, 104 S.Ct. at 1362.

In Rudd v. Ray, 248 N.W.2d 125 (Iowa 1976), the Iowa Supreme Court upheld Iowa's practice of paying chaplains to serve the Iowa State Penitentiary. The Iowa Court did not subject the prison

chaplaincy to the strictures of the Lemon-Nyquist test because it found that the "crucial and controlling fact in this case is that it deals with the exercise of religion by prison inmates. Prison inmates are restrained and consequently deprived of their liberty." Id. at 128. Because of the restraints placed on prisoners, the Iowa Supreme Court determined that a prison chaplain was permissible in order to guarantee the free exercise rights of prisoners under the United States and Iowa Constitutions. Id. at 129.[6]

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[6]Article I, Section 3, of the Iowa Constitution states:

> The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

Important to the Iowa Supreme Court's ruling in Rudd is the fact that both the United States and the Iowa Constitutions prohibit the state from denying its citizens the free exercise of religion. The Court found that because the state restrains inmates from leaving the confines of the prison to attend religious services, the state would be denying them the free exercise of religion by not providing a place to worship and chaplains or ministers to lead the worship.

The plaintiffs contend that the Rudd analysis should not be applied in this case because Rudd was considered by the Iowa Court as a reasonable accommodation to fulfill the constitutional obligation to not interfere with prisoners' free exercise of religion. Plaintiffs argue

that hospital patients are not in the same situation as prisoners therefore Rudd does not apply. Plaintiff asserts that in contrast to prisoners Broadlawns patients are not required by the government to stay and they may leave at any time. This is not entirely a practical approach, however, since few people confined to a hospital can leave "at any time." Further, as a county hospital, Broadlawns serves patients who may be wards of local law enforcement authorities and are offered treatment only at Broadlawns. Again, these people are not free to leave at any time. Further, indigents are treated at Broadlawns who may have no other hospitalization alternatives. An indigent's freedom to leave the hospital is limited by his health and ability to

secure medical care elsewhere. Therefore, contrary to plaintiffs' assertions, in many instances, patients are not free to leave at any time. While a prisoner is restrained by state compulsion a patient is restrained by his physical well-being, a restraint over which a patient may exercise even less control than a prisoner.

Plaintiffs next contend that the Rudd analysis is inapplicable because while at Broadlawns, patients are substantially better able to pursue their religious needs than are prisoners since there are no security reasons for not allowing free access to the hospital by religious persons. Plaintiffs further point to the existence of the present volunteer chaplain program in support of this con-

tention and the fact that patients up until now have relied on volunteer services. While it is true that volunteer chaplains are permitted at the hospital, the Board of Trustees has made a determination that religious services are not available on a sufficiently regular basis under the volunteer program to meet patient needs. Plaintiffs did not show otherwise; therefore, as in Rudd the interests under the Free Exercise Clause must be considered.

Plaintiffs further argue that a logical extension to the argument permitting a paid hosptial chaplain due to the inability of some patients to obtain religious services elsewhere would permit small Iowa towns to build and staff community churches to meet the religious needs of

poor or ill citizens who are unable to attend church in a larger community. The Court does not agree that this Order could be read so broadly. The State cannot set up a church. Everson v. Board of Education, 330 U.S. 1, 15 (1946). Building and staffing community churches would be such an advancement of religion that it would clearly be proscribed by the Establishment Clause of the First Amendment. The Court deals here with the limited situation of hospital patients who are confined to a public hospital served by an inadequate volunteer chaplain program. This Order cannot be read as permitting the building or staffing of community churches.

The plaintiffs next contend that Rudd should not be relied on because the deci-

sion is wrong. The Court finds no merit to this argument. In deciding Rudd, the Iowa Supreme Court considered Cruz v. Beto, 405 U.S. 319 (1972), where Supreme Court acknowledged allegations in a complaint that "Texas encourages inmates to participate in other religious programs, providing at state expense chaplains of the Catholic, Jewish and Protestant faiths; providing also at state expense copies of the Jewish and Christian Bibles and conducting weekly Sunday school classes and religious services." In Cruz, the plaintiff, a Buddhist Texas prison inmate, brought a 42 U.S.C. §1983 action alleging discrimination by the prison on the basis of his religion because among other things, he was not permitted to use the prison chapel. The Supreme Court held

that plaintiff there had stated a cognizable claim for discrimination on the basis of religion and stated, "If the allegations of this complaint are assumed to be true, as they must be on the motion to dismiss, Texas has violated the First and Fourteenth Amendments." Id. at 322. The Court further stated:

> A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom granted by the First and Fourteenth Amendments without fear of penalty.

Id. at 322, n. 2.

This Court is persuaded that Rudd was correctly decided.

To summarize, while the analogy between prisoners and inpatients at

Broadlawns Medical Center is not perfect, it is a good one. Plaintiffs have not disputed defendants' assertions that Broadlawns provides medical care to indigents and patients who may be wards or prisoners of local law enforcement authorities, persons who are unable to secure medical care elsewhere. Both a prisoner and a Broadlawns patient are confined to government institutions. The prisoner's freedom is restrained by state compulsion. As mentioned, a patient's freedom is most often restrained by his own physical well-being, a circumstance over which a patient usually has little control. The employment of a regular chaplain should help eliminate the problems of access to religious services of such patients and others upon their

request. There has been no evidence of complaints concerning volunteer chaplains and their administration of religious services while on the job. The procedures for providing religious services will not change under the proposed employment; only the availability of such services will be affected.

Plaintiffs do not object to the presence of clergymen in the hospital on a volunteer basis. The plaintiffs on the present record have not shown that the Board of Trustees was incorrect in determining that the volunteer program was not satisfying patient needs. The hiring of a chaplain as the Court understands it will do little to change chaplain services as they are now administered to patients except to make them more readily

available. Plaintiffs' main objection concerns the funding of the chaplain position. Under circumstances where payment of public funds is necessary to preserve patients' interests in the free exercise of religion while confined to a public hospital such payments may be constitutionally permissible.

The plaintiffs bear the burden of proof on a motion for preliminary injunction. They have not satisfied the Court that the present volunteer chaplain program is sufficient to insure the interests of Broadlawns' patients in the free exercise of religion under the First Amendment. Without making a final decision on the issue raised by plaintiffs, the Court concludes that it is more likely that defendants will succeed on the merits

of the claim.

4. The Public Interest.

As mentioned, patients at a public hosptial may be indigent, transient, in state custody, or otherwise confined due to illness or injury. The public interest under the circumstances here lies with accommodating a need for hospitalized individuals to have ready access to a trained chaplain, while not excessively entangling the government in that function. To the extent possible, it is within the public interest to provide chaplain services on a volunteer basis. While the issues have not been fully developed as yet, it would appear that where a volunteer chaplain program is shown to be insufficient to satisfy patients' needs for religious services, it may not be

unconstitutional for a public hospital to hire a chaplain to provide requested services and patient counseling.

CONCLUSION

Plaintiffs have shown a "threat" that they will be irreparably harmed through the violation of their constitutional rights if a paid chaplain is employed by Broadlawns. However, defendants assert that the present volunteer chaplain program is unsatisfactory in meeting patients' religious needs. This case illustrates the inescapable tension between the Free Exercise Clause and the Establishment Clause. After balancing the constitutional interests on both sides, the Court concludes, without finally deciding the issue, but relying on the

Dataphase approach and upon the facts before the Court now, the motion for preliminary injunction should be denied.[7]

Accordingly,

IT IS THEREFORE ORDERED that plaintiffs' motion for an emergency restraining order, treated as a motion for preliminary injunction, is hereby denied.

IT IS FUTHER ORDERED that because of the complex constitutional issue involved, this case should be fully presented and tried in the very near future, and trial is set for 9:00 a.m., October 3, 1985 in the United States Courthouse, Des Moines, Iowa.

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[7]Had the plaintiffs been represented by counsel from the onset and presented their evidence and contentions as they apply to the Dataphase test, the decision might have been different.

IT IS FURTHER ORDERED that all discovery shall be completed ten days before said trial date.

September 6, 1985.

/s/ Donald E. O' Brien
Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

V. JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2393
No. 87-2425

Larry Henry Carter, Courtney Demaris Carter, and Maurice Labelle, Appellants, vs. Broadlawns Medical Center, Polk County Hospital Trustees; Douglas Hart; John Ahern; William Dyar; Carole Romine; Margaret Stout; Jeanne Miller; Milton Brown, Executive Director; Charles Ingersoll, Hospital Director; Quentin Hunter, Social Services Director, Lloyd Kaufman, Volunteer Chaplain; Peter Pintus and Raymond Runkel, Appellees.	*	CIVIL NO. 84-800-E JUDGMENT Entered September 13, 1988

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered adjudged that the judgment of the district court is affirmed in part and remanded in part with directions to the district court for proceedings consistent with the opinion of this Court.

September 13, 1987.

A true copy.

ATTEST:

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED: 11/10/88

VI. COURT OF APPEALS ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2393
No. 87-2424SI

Larry Henry Carter, et al.,	*	
Appellees/Cross Appellants,	*	Appeal from the United States District Court for the Southern District of Iowa
vs.	*	
Broadlawns Medical Center, et al.,	*	Entered November 2, 1988
Appellants/Cross Appellees.	*	

Appellees/cross-appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 2, 1988

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

VII. JUDGMENT OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Larry Henry Carter, Courtney Demaris Carter, and Maurice Labelle,	*	
Plaintiffs,	*	CIVIL NO. 84-800-E
vs.	*	
Broadlawns Medical Center, et. al.,	*	JUDGMENT
Defendants.	*	Entered July 9, 1987

This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant and against the plaintiff on plaintiffs' prayer for declaratory and injunctive relief regarding the hiring and con-

tinued employment of a paid chaplain at Broadlawns Medical Center.

IT IS FURTHER ORDERED AND ADJUDGED that Chaplain Maggie Rogers and any successor to her as paid chaplain at Broadlawns Medical Center are enjoined from counseling of employees, families of patients where the patient is not in a life-death situation, and outpatients.

IT IS FURTHER ORDERED AND ADJUDGED that Broadlawns Medical center is hereby enjoined from permitting chaplains' access to patient medical records absent express consent from the patient, his or her guardian or next of kin.

IT IS FURTHER ORDERED that plaintiffs' prayer for an award of compensatory damages is hereby denied.

July 9, 1987.

James R. Rosenbaum

CLERK OF THE DISTRICT COURT

(2)

Supreme Court, U.S.
FILED
MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1286

In The

Supreme Court of the United States

October Term, 1988

LARRY HENRY CARTER, COURTNEY DEMARIS CARTER, and MAURICE LaBELLE,

Petitioners,

v.

BROADLAWNS MEDICAL CENTER, POLK COUNTY HOSPITAL TRUSTEES, DOUGLAS HART, JOHN AHERN, WILLIAM DYAR, CAROLE ROMINE, MARGARET STOUT, JEANNE MILLER, MILTON BROWN, CHARLES INGERSOLL, QUENTIN HUNTER, LLOYD KAUFMAN, PETER PINTUS, RAYMOND RUNKEL AND IOWA INTERFAITH AGENCY FOR PEACE AND JUSTICE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES L. SAYRE
SAYRE & GRIBBLE, P.C.
718 Equitable Building
Des Moines, Iowa 50309
(515) 244-1437
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the religion clauses of the First Amendment to the United States Constitution prohibit a public hospital, which is owned and controlled by the government, from spending taxpayers' monies to employ a chaplain.

LIST OF PARTIES

This action was filed in the United States District Court for the Southern District of Iowa by Larry Henry Carter. Initially, Mr. Carter named as Plaintiffs himself, his daughter Courtney, American Atheists, John Doe, and Jane Roe. By the time of trial, American Atheists had withdrawn as a party plaintiff, as had Jane Roe. John Doe was identified as Maurice LaBelle. Each of the individual Plaintiffs is a natural person, residing in Des Moines, Polk County, Iowa. Carter and LaBelle are white adult males, and Courtney Carter is a white minor female, the daughter of Larry Carter. Mr. Carter and Mr. LaBelle claim to be state and federal taxpayers. All parties claim to profess atheism, and eligiblity for medical treatment at Broadlawns Medical Center (BMC).

Broadlawns Medical Center is a county public hospital, organized and existing pursuant to Chapter 347, *Code of Iowa* (1985). Under Section 347.9, *Code of Iowa* (1985), the hospital is governed by a Board of Trustees who were, at all times material, Defendants John Ahern, Milton Brown, William Dyar, Douglas Hart, Jeanne Miller, Carole Romine, and Margaret Stout. Defendants Charles Ingersoll was Executive Director of the hospital, and Defendants Quentin Hunter and Lloyd Kaufman were, respectively, the Director of the hospital and the Director of Social Services.

Defendant Iowa Interfaith Agency for Peace and Justice is a nonprofit organization composed, primarily, of ministers from various religious denominations. The Agency has historically provided assistance to the State

LIST OF PARTIES – Continued

of Iowa in conducting searches and interviews for chaplains placed in state institutions, such as state prisons and mental health institutions. When the Board of Trustees determined that BMC should hire a chaplain, $1,250 was allocated for expenses to be paid to the Agency to advertise the position and initially screen chaplaincy applicants. Two applicants, including current BMC Chaplain Maggie Rogers, were recommended by the Agency to the Board of Trustees as candidates qualified for the BMC position. The individual Defendants Ramon Runkel and Peter Pintus are both ordained ministers. Each has been a member of the Iowa Interfaith Agency for Peace and Justice, with Reverend Runkel serving on the chaplaincy search committee in the final interviewing stages. Both served as volunteer chaplains at BMC during various periods of time preceding the employment of a full-time chaplain.

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No. 88-1286

In The

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October Term, 1988

LARRY HENRY CARTER, COURTNEY DEMARIS CARTER, and MAURICE LaBELLE,

Petitioners,

v.

BROADLAWNS MEDICAL CENTER, POLK COUNTY HOSPITAL TRUSTEES, DOUGLAS HART, JOHN AHERN, WILLIAM DYAR, CAROLE ROMINE, MARGARET STOUT, JEANNE MILLER, MILTON BROWN, CHARLES INGERSOLL, QUENTIN HUNTER, LLOYD KAUFMAN, PETER PINTUS, RAYMOND RUNKEL AND IOWA INTERFAITH AGENCY FOR PEACE AND JUSTICE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Broadlawns Medical Center, et al., respectfully request that this Court deny the Petition for Writ of Certiorari filed by the Petitioners, Larry Henry Carter, et al., seeking review of the opinions and decisions of the Court of Appeals of the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 857 F.2d 448 (8th Cir. 1988). The post-trial memorandum opinion of the district court is reported at 667 F.Supp. 1269 (S.D. Iowa 1987). The district court's order regarding post-trial motions is reported at 672 F.Supp. 1149 (S.D. Iowa 1987). All of the above are set forth in appendix to the Petition for Writ of Certiorari.

JURISDICTION

Respondents acquiesce in Petitioners' statement of jurisdiction.

The judgment of the court of appeals was made and entered on September 13, 1988. Petitioners' Petition for Rehearing en banc was denied on November 2, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides in pertinent part as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .
> U.S. Const. amend. I.

RESPONDENTS' STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Broadlawns Medical Center (BMC) is the largest county public hospital in the State of Iowa. BMC is also unique, in comparison to all other public county hospitals in Iowa, in having its own psychiatric unit. Named the Sidney Sands Unit, the psychiatric facility serves patients in Polk County and, occasionally, from surrounding counties, at public expense. In counties other than Polk, psychiatric patients are placed in one of the four mental health institutes maintained by the State of Iowa and located in Mount Pleasant, Independent, Cherokee and Clarinda.

Psychiatric patients at BMC constitute approximately fifty percent (50%) of the inpatient population, and the average length of stay of psychiatric patients is almost triple that of patients in the medical unit of the hospital. In addition, there is an adolescent psychiatric unit which deals mainly with chemical abuse problems, and may house up to sixteen (16) patients.

While not all of the patients in Sidney Sands or the adolescent psychiatric unit have been involuntarily committed, psychiatric patients do not have freedom of movement, and access to the psychiatric units is restricted. The psychiatric units are "lock-up" wards. That is not true of the medical unit of the hospital; however, the patients receiving medical attention are restricted in their mobility by their illness or injury.

The Volunteer Chaplaincy Program at BMC

For many years preceding this dispute, BMC had a volunteer chaplaincy program. Volunteer chaplains were actively sought for involvement in the program and all volunteer chaplains were under the general supervision of the Director of Social Services, most recently Lloyd Kaufman. The volunteer chaplains at Broadlawns Medical Center performed a variety of services for patients, none of which were challenged in the Complaint or First Amended Complaint. A primary task was to interview new admissions to determine if the newly admitted patients had any needs or requests which could be filled by the chaplains. The volunteer chaplains would, upon request, provide prayer and other religious services to patients, of their family members, and would contact the local minister of a particular patient, upon request. Volunteer chaplains also counseled both patients and family members. Volunteer chaplains would visit the psychiatric units, although most volunteers did not feel adequately prepared to meet the needs of long-term psychiatric patients, either by experience or availability of time required. As noted by both chaplains and physicians, the psychiatric unit had a significant unmet demand for chaplaincy services.

The direct testimony of all of the individuals involved with the volunteer chaplaincy program and patient services agreed that the volunteer chaplaincy program was decreasingly able to meet the needs of the patient population in the time period preceding the decision to employ a full-time chaplain. Both the Trial Court and the Court of Appeals recognized this fact in their

respective decisions. Despite efforts by Lloyd Kaufman and the volunteer chaplains to recruit additional help, chaplaincy services available did not meet the needs of the BMC patient population.

Employment of a Full-Time Chaplain

At least as early as 1972, the issue of BMC employing a full-time chaplain came before the Board of Directors. From the minutes of the May 9, 1972, Board of Trustees meeting, it is apparent that Ramon Rankel advocated the employment of at least one full-time chaplain at Broadlawns, but that a decision on the matter was indefinitely postponed by the Board of Trustees. The matter was dormant for approximately the next twelve (12) years, coming before the Board again, in the meeting of the Board of Trustees on December 13, 1983. In the meeting of the Board of Trustees on January 10, 1984, a motion was made and carried which opened for discussion the potential employment of a full-time chaplain at BMC. This was followed by the development of a job description for a medical center chaplain by the personnel committee of BMC in a meeting of February 9, 1984, and subsequently modified into the current form being used at BMC and supplemented by Lloyd Kaufman and Maggie Rogers, the chaplain employed (App. 1-3).

The Board of Trustees of BMC voted to employ a full-time chaplain at the regularly scheduled meeting of June 12, 1984, with a salary range of $18,000 to $23,000. On October 9, 1984, the Board of Trustees approved funding of $1,250 for employment of the Iowa Interfaith Agency

for Peace and Justice for the initial chaplaincy advertising and screening process.

The Board of Trustees at BMC held regular monthly meetings throughout 1984. During the months preceding the filing of this action, Larry Carter wrote to BMC Trustees and employees, opposing the hiring of a chaplain by BMC on legal and personal grounds. Mr. Carter also attended meetings of the Trustees wherein he participated in discussions of the chaplaincy issue, and expressed his opinions in open meeting. During his attendance at the meetings, Mr. Carter was a member of the Primary Care Advisory Board at BMC, and identified himself in both that capacity, and the capacity as an atheist and representative of American Atheists, Inc.

Due to the filing of the instant action on November 1, 1984, the Board of Trustees voluntarily refrained from proceeding to hire a chaplain, anticipating a judicial resolution of Carter's request for an emergency restraining order. After nine months of voluntary restraint, however, on August 8, 1985, the Board of Trustees moved to employ a chaplain within sixty (60) days, unless enjoined from so doing by the trial court. On September 9, 1985, the Honorable Donald O'Brien denied Plaintiffs' Request for an Emergency Restraining Order. Having reviewed recommendations by the Iowa Interchurch Agency for Peace and Justice, Defendants and hospital employees interviewed chaplaincy candidiates. Chosen for the position of BMC chaplain was Maggie Alzeno Rogers, who began full-time employment as a paid chaplain on November 20, 1985.

Functions and Duties of the Full-Time Chaplain

The chaplain, Maggie Alzeno Rogers, testified at the time of trial commencing on May 20, 1986, at that time having been gainfully employed as a chaplain at BMC for approximately six months. Chaplain Rogers possesses a Master's of Divinity Degree, and is trained in grief counseling and Clinical Pastoral Education, referred to as CPE. In her employment, Chaplain Rogers was given an office located in the basement of the central building of BMC, across from the Nauraine conference room, and wears a badge, that identifies her as "Chaplain Maggie Rogers." Testifying from the job description and her own experiences, Chaplain Rogers explained that since her employment, as a full-time chaplain, the volunteer chaplain program, which continued to operate, had been assigned the responsibility of interviewing new admissions, for the purposes of determining whether or not any further chaplaincy services were desired by patients who were new to the hospital, and to remove that responsibility from the full-time chaplain and thereby allow her to devote time to her other responsibilities.

Chaplain Rogers testified that her duties include:

a. following up on patient referrals received from the volunteer chaplains;
b. making preoperative calls on surgical patients, when her time permits;
c. upon referral, counseling the members of families of patients; and
d. making contacts in the intensive care unit at surgical waiting rooms.

Chaplain Rogers will provide "religious services" upon request, such as the administration of sacraments and

praying with a patient; she is also available for counseling to the staff of BMC and is part of an oncall coverage of all of the chaplains who participate in the volunteer chaplain program; she functions as a consultant to the medical and psychiatric staffs, and has been called in on occasion to deal with psychiatric patients who have had problems dealing with a faith or theological issue or who simply request in-depth counseling from the chaplain employed by BMC. Chaplain Rogers specifically testified to a number of factual examples reflecting this type of in-depth work with particular patients.

As the full-time, employed chaplain at BMC, Chaplain Rogers also coordinates the activity of the volunteer chaplains, attempts to recruit new chaplains to that program, and does contact clergy of patients at the hospital, upon request of the patient. Chaplain Rogers also initiated a weekly Bible study group at Broadlawns West, at the request of residents there.

Chaplains Rogers, Charles Hart, and Marcus Engelhardt testified to the concept of Clinical Pastoral Education (CPE) and duties of a chaplain, being those of supporting patients in their faith. Prohibited is any activity to convert or advocate belief in a particular religion. Chaplaincy in a hospital or institutional setting was defined as serving patient needs, listening, and supporting a patient in the patient's own frame of spiritual reference. Chaplain Rogers further testified that the volunteer chaplains were expected to adhere to the concept of CPE, not proselytizing patients, and to be trained in the concept of Clinical Pastoral Education. The supervisors of Chaplain Rogers, Lloyd Kaufman and Charles Ingersoll, both testified that in their opinion the existence

of a full-time chaplain would be a deterrent to any proselytization of patients by visiting clergy.

Chaplain Rogers admitted, openly, that she would perform "religious services" such as the administration of sacraments, or praying with an individual, or reading the Bible to that person, if the individual requested or, to do so upon request, with family members. Chaplain Rogers acknowledged that her office does contain religious symbols, such as pictures of Jesus Christ, symbolic representations of the cross, and that there are hymnals stacked on a table in the Nauraine conference room. This appears to be the extent of the "religious paraphernalia" of which the Plaintiffs complained. There is a single parking place reserved for visiting ministers in the front of the main entrance to BMC, and there is a space provided on the form that patients fill out upon admission to the hospital where the individual can list his or her religious preference, both of which are opposed by Plaintiffs.

The nature of the duties of the BMC chaplain are quite comparable to those tasks performed by the volunteer chaplains in the past, with the exception of Chaplain Rogers having undertaken the supervision and coordination of the volunteer chaplains, thereby relieving Lloyd Kaufman of that responsibility. Chaplain Rogers does not see new admissions, that task being delegated to the volunteer chaplains, which, in turn, allows Chaplain Rogers to "focus" her activities and meet needs that were not being met in the past, such as the residents at Broadlawns West and the in-depth work with particular patients at Sidney Sands.

II. PROCEEDINGS BELOW

Respondents acquiesce in the statement of the proceedings below set forth in the Petition for Writ of Certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE QUESTION OF WHETHER TAXPAYERS' MONIES MAY BE USED BY A PUBLIC HOPITAL TO EMPLOY A CHAPLAIN WAS CORRECTLY DECIDED BY THE COURT OF APPEALS OF THE EIGHTH CIRCUIT.

A. The Court Of Appeals Was Correct In Its Analysis Of The Facts And The Application Of The *Lemon* Criteria.

In reviewing the decision of the United States District Court for the Southern District of Iowa, the Court of Appeals for the Eighth Circuit focused its attention on the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and overruled the district court, which had held that the employment of a chaplain at Broadlawns Medical Center failed two of the three *Lemon* elements, those being that the practice, in this case, the employment of a chaplain, must reflect a clearly secular purpose, and secondly, that the employment of a chaplain provided more than a mere incidental advancement of religion. Both the Court of Appeals of the Eighth Circuit and the United States District Court of the Southern District of Iowa held that the employment of a chaplain at Broadlawns Medical Canter did not give rise to undue entanglement between church and state.

1. The Secular Purpose

It is apparent from the job description (App. 1-3) and the actual testimony of the person performing the duties of chaplain that the ultimate object to be achieved was to provide a service and a spiritual aspect to the care of the patients, family members and staff at Broadlawns Medical Center, with more continuity and general availability than had been available with the volunteer chaplain program.

The employment of a chaplain at Broadlawns Medical Center is to provide immediate access on the part of patients, family members, and, in some instances, employees of the hospital, in the context of primary health care and psychiatric care, and in such a way as is defined, in the final analysis, by the patient or family member or employee, himself or herself, not by the chaplain, the Board of Trustees or even the Court.

It is for the purpose of providing services to patients that the chaplain was employed by Broadlawns Medical Center, and the testimony on that issue was consistent throughout the trial proceedings. Such testimony was clearly and correctly analyzed by the Court of Appeals of the Eighth Circuit in its decision; *Carter v. Broadlawns Medical Center*, 857 F.2d 448, 451-2 (8th Cir. 1988).

The district court acknowledged that it was "a close question" whether the purpose of the chaplain was clearly secular, and in so doing, recognized the principles of Clinical Pastoral Education (CPE) were not only adhered to by Chaplain Rogers, but required by Broadlawns Medical Center in the employment of chaplains

and of those individuals functioning as volunteer chaplains. The district court, however, rejected the concepts as not clearly secular, because one of the main purposes is to meet the religious needs of patients. In so doing, the district court predicated its decision on the first step of the *Lemon* test upon a concept of total separation or absoluteness which this court cautioned against in *Lynch v. Donnelly,* 465 U.S. 668 (1984):

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . . " Committee for Public Education and Religion Liberty v. Nyquist, 413 U.S. 756, 760, 93 S.Ct. 2955, 2958, 37 L.Ed.2d 948 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, e.g., Zorach v. Clauson, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952); McCollum v. Board of Education, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Zorach, supra, 343 U.S., at 314, 72 S.Ct., at 684. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the Frist Amendment's guaranty of the free exercise of religion." McCollum v. Board of Education, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L.Ed. 649 (1948).
>
> 465 U.S. at 673.

In rejecting the secular concepts of CPE and holding that the employment of a chaplain at Broadlawns Medical Center violates the first prong of the *Lemon* criteria, the

district court approached the issue in the absolute fashion, cautioned against by this Court and ignored a primary, functional component of the Clinical Pastoral Concept, and that being that it is the individual, be it patient, family member or employee, who defines his or her need, be it religious, spiritual, or otherwise, and in that sense, the delivery of any "religious services" by the chaplain to the patient are really incidental to the purpose and function of the chaplain, which is to serve and be a part of the wholistic approach to providing health care, primary or psychiatric. The district court failed to recognize that the practice, in this instance the employment of a chaplain, motivated in part by a religious purpose may still satisfy the initial element, that being a clear secular purpose; see *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). And it is clear, particularly in *Lynch v. Donnelly*, that the secular purpose need not be clear and overriding, but rather, must simply exist so that there is not a question that the statute or activity was completely derived from religious motivation.

The Court of Appeals for the Eighth Circuit correctly distinguished the difference, in finding a secular purpose, between an approach predicated upon reviewing the religious nature of an activity, *only*, and failing to consider all aspects of the challenged conduct, citing to *Lynch* and holding:

> *Lynch* made it clear that the presence of religious purposes would not doom a law or practice, as long as there was also a secular purpose.
>
> * * * * *

> Though the district court correctly observed that the challenged action need not be exclusively secular to pass the purpose test, 667 F.Supp. at 1279, in actuality it considered the presence of a religious purpose fatal, despite factual findings establishing a valid secular purpose.
>
> * * * * *
>
> In other words, the purpose of the chaplaincy was the same as that of the hospital generally – to help patients get well or at least to provide the best care possible for those who would not get well.
>
> * * * * *
>
> The district court in this case slipped into the same legal error made by the district court in *Lynch v. Donnelly,* by focusing on the religious purpose in isolation from the larger context, which reveals a valid secular purpose: "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause . . . ."
>
> 857 F.2d at 454.

The Court of Appeals for the Eighth Circuit correctly held that the employment of a chaplain at Broadlawns Medical Center passes the first element of the *Lemon* test. The employment of a chaplain does reflect a clearly secular purpose, and the religious aspect is incidental to the delivery of services related to primary health and psychiatric care in the hospital environment. The Court should deny the Petition for Writ of Certiorari and allow the decision of the Court of Appeals of the Eighth Circuit to stand on the issue of a secular purpose in the employment of a chaplain.

2. Broadlawns Medical Center's Employment Of A Chaplain Does Not Have The Effect Of Advancing Religion.

In addressing the second element of the *Lemon* test, the Court of Appeals of the Eighth Circuit held that the employment of a chaplain by Broadlawns Medical Center did not constitute any direct advancement of religion, reversing the decision of the district court, which had held, in part, that the payment of a chaplain to provide religious care, while acknowledging that the provision of religious care by the chaplain was not the chaplain's only assigned duty, violated the second prong of the *Lemon* test in advancing religion.

The precept is that the activity complained of must neither advance nor inhibit religion. This is the basic balance to be struck between the Separation Clause and the Free Exercise Clause of the First Amendment of the Constitution. The court has found no violation of this particular prong of the *Lemon* analysis in the employment of a chaplain, at public expense, to open with prayer the sessions of the Nebraska legislature; *Marsh v. Chambers*, 463 U.S. 783 (1983). The forum at issue in the *Marsh* case would certainly present the appearance of an activity more likely to impact upon individuals who perhaps do not wish such contact with religion than any facts that have been presented in the case at bar.

In the environment of BMC, the activities of the chaplain, be it the full-time chaplain, Maggie Rogers, or any of the volunteers, are, essentially, private conduct occurring between the chaplain and the individual patient. The presence of a chaplain, volunteer or

employed, in and of itself, does not constitute the advancement of religion, nor does the fact that a chaplain may interview new admittees, wear a nametag or have an office with a nameplate on it, or that patients are asked (not required) to complete an admission form which includes a question on religious preference. Beyond that, the more specific activities of a chaplain occur only at the *request* of the patient, be they prayer with a patient, grief counseling, Bible reading, of theologic discussion. Such activities are, as the facts of this case clearly establish, not in the nature of proselytization and not conduct which advances religion, but rather are conduct which, if prohibited, would in fact inhibit the individual patient's right to freely exercise his or her religious belief, faith, or concept of spirituality. In that context, this case is not comparable, factually, to the Establishment Clause – school cases upon which Petitioners rely so heavily in their Petition for Writ of Certiorari; *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Aguilar v. Fulton*, 437 U.S. 402 (1985); and *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985). In each instance, the Establishment Clause – school cases deal with conduct which either impacted upon all of the affected students in the particular school environment or, in the alternative, involved an activity or conduct that was not necessary from the standpoint of accommodating the free exercise of religious beliefs of the constitutency sought to be served; in addition, factually the *Aguilar* and *Grand Rapids* decisions turned, in substantial part, upon the finding by the Supreme Court of excessive governmental entanglement in the religious activity involved. The school cases, in the main, do not address or turn upon the free exercise clause, in striking the appropriate

balance required by the *Lemon* criteria. That balance and the free exercise concept are much more acute in the case at bar, where it is apparent that to prohibit or restrict chaplains, volunteer or employed, would be to effectively inhibit the free exercise of religious beliefs and freedoms on the part of patients at BMC. The status of the chaplain, as volunteer or employed, is not particularly germane to this aspect of the *Lemon* analysis.

The Court of Appeals of the Eighth Circuit correctly addressed the purpose and the performance of the chaplain:

> The district court's findings stress the fact that the existence and nature of the religious content in Rogers' services to a patient depended entirely on the patient's pre-existing preferences:
>
> > The record is clear that Chaplain Rogers does perform her duties consistent with the concept of Clinical Pastoral Education (CPE). The explanation of this concept demonstrates that in this setting, the chaplain's function is not the traditional parish-or institutional-style ministry. Rather, its purpose is to address the needs of the individual patient, as defined by the patient, not the chaplain. Proselytization or and effort to impact [sic] religion or religious beliefs upon individuals who do not already have such beliefs is totally inconsistent with the CPE concept and is scrupulously avoided by Chaplain Rogers.
>
> 667 F. Supp. at 1274. The district court also found that Rogers "does not view her primary focus as religious." Id. at 1281. The evidence supported these findings of neutrality. Rogers' testimony established that patients of all persuasions may take advantage of her counseling on their own terms, and there was testimony by one chaplain from another hospital (who was also trained in C.P.E.) about a recent

> instance in which an atheist patient had come to him for grief counseling. June 26, 1987 Tr. 37.
>
> The taxpayers argue that the chaplaincy violates the effect test by inculcating particular beliefs, by subsidizing religious activities, and by effecting a "symbolic link" between church and state.
>
> The district court's findings that Rogers has avoided proselytization show that there is no direct advancement of religion by Broadlawns inculcating any religious belief or practice.
>
> 857 F.2d at 455

As emphasized above, the constitutional focus is on the purpose of the complained of activity or its actual performance. If neither are a direct advancement of religion, the activity passes the second *Lemon* element, the unfounded speculations of proselytization notwithstanding.

The Seventh Circuit Court of Appeals recognized in *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986), in a case involving, indirectly, the provision of chaplaincy services within Veteran's Administration Hospital facilities, the same neutral balance:

> If there was not a chaplaincy program, veterans might have to choose between accepting the medical treatment to which their military service has entitled them and going elsewhere in order to freely exercise their chosen religion.
>
> 782 F.2d at 709.

The same can be said for patients at BMC, a public, county hospital, which not only provides patient care for residents of Polk County, Iowa, who are in need of medical attention and who do not have the wherewithal or desire to go elsewhere, but performs, in essence, the function of a local mental health institute, in having

psychiatric patients, as well. This is not a situation comparable to that in *Ford v. Manuel*, 629 F.Supp. 771 (N.D. Ohio 1985), where an impermissible, nonsecular interest is advanced by creating the appearance of official support for religion on the part of impressionable children.

The proper distinction was made by this Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984), in discussing the impact a creche included by a city in its annual Christmas or holiday exhibit,

> We can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon (religion) is, for that reason alone, constitutionally invalid." Nyquist, supra, 413 U.S. at 771, 92 S.Ct., at 2965; see also Widmar v. Vincent, 454 U.S. 263, 273, 102 S.Ct. 269, 276, 70 L.Ed.2d 440 (1981). Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.
>
> 465 U.S. at 683.

The indirect benefit, if any, to religion involved in the employment of a chaplain is comparable to that of the municipal erection of a creche at Christmas time in that the activities of a chaplain are focused upon the individual, having no direct or even widespread involvement in the ongoing activities of a publicly-supported hospital. The argument of Petitioners that the basic employment of

a chaplain is the advancement of religion per se is a simplistic approach to the problem, and would have resulted, in *Lynch* and *Marsh*, for example, in completely different decisions if the analysis stopped at the concept or definition at issue. The actual functioning of a chaplain, both in terms of the concept as defined by the various individuals who testified in the trial proceeding and certainly as elaborated upon by the chaplain herself, throughout her testimony, and relied upon by the Court of Appeals of the Eighth Circuit, makes it clear that any connection to religion is indirect in the employment of a chaplain, and certainly the testimony is clear and unequivocal that the intended beneficiary of the employment of a chaplain had nothing at all to do with a particular religion, denomination, or the advancement of religion, but rather, the provision of services to patients, family members and employees of the hospital; see and compare *Hunt v. McNair*, 413 U.S. 734 (1973).

The Court of Appeals for the Eighth Circuit correctly Held that the employment of a chaplain by Broadlawns Medical Center did not violate the second element of the *Lemon* test, by impermissibly advancing religion in any direct fashion, and on that basis, the decision of the Court of Appeals of the Eighth Circuit should not be reviewed by this Court, and the Petition for Writ of Certiorari should be denied.

3. The Employment Of A Chaplain By Broadlawns Medical Center Does Not Create Excessive Entanglement Between Government And Religion.

Both the district court and the Court of Appeals for the Eighth Circuit find that the challenged practice, the employment of a chaplain by a public, county hospital, did not give rise to undue entanglement between church and state.

Excessive governmental entanglement is the final aspect of the three-prong analysis required by the *Lemon* criteria. Certainly this is not, factually, a situation comparable to the Establishment Clause – school cases, such as *Aguilar v. Fulton*, 437 U.S. 402 (1985), and *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985), where public assistance, in different forms, provided to religious educational institutions was determined to be in violation of the Establishment Clause on the basis of excessive governmental entanglement in the religious nature of the educational institutions involved. There is not, factually, in the employment of a chaplain at Broadlawns Medical Center, the interaction of church and state in the administration of the direct services of a chaplain to the patients at Broadlawns Medical Center that has resulted in a conclusion of excessive governmental entanglement, see *Aguliar* and *Grand Rapids*. The employment of a full-time chaplain at Broadlawns Medical Center does not cause anyone, even the chaplain herself, operating within the parameters of clinical pastoral education, as it has been defined in the trial proceedings, to become excessively involved in determining what is or is not religious. There is no evidence to suggest that Broadlawns Medical Center, its employees, administrators or trustees, will become

involved in any continuing surveillance, to an impermissible degree, in order to maintain the constitutionally required separation between church and state, which also can constitute excessive entanglement; see *Bell v. Little Axe Independence School Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985).

The Petitioners' complaints concerning the fact that the chaplain is an employee of Broadlawns Medical Center, and would be treated as any other employee in terms of payment, evaluation and a day-to-day relationship with her supervisor significantly mischaracterizes the concept of excessive governmental entanglement as previously defined by this Court. The Court of Appeals of the Eighth Circuit accurately recognized that a public, county hospital cannot escape entanglement with patients' religious problems and, focusing once again with constitutional clarity, recognized that the employment of a chaplain will in fact reduce the entanglement that could exist and did exist at Broadlawns Medical Center with unsupervised, volunteer chaplains; 857 F.2d at 456.

The decision of the Court of Appeals of the Eighth Circuit on the third prong of the *Lemon* test, the existence of excessive governmental entanglement, was accurate and does not provide the basis for this Court to grant the Petition for Writ of Certiorari.

II.

THE FREE EXERCISE CLAUSE PERMITS BROADLAWNS MEDICAL CENTER TO EMPLOY A CHAPLAIN.

The Petitioners, as they have throughout the proceedings, choose to characterize this issue as one of compulsion as opposed to a permissible accommodation of free exercise rights.

The issues in the case at bar directly impact upon the opportunity which patients at Broadlawns Medical Center, either psychiatric or medical, have to freely exercise their chosen religious beliefs, and in that instance, are comparable to the factual circumstances involving veterans who are patients at hospitals operated by the Veteran's Administration; see *Katcoff v. Marsh*, 755 F.2d 223 (2nd Cir. 1985), and *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986); as well as being comparable to the factual circumstances of individuals in penal institutions in Iowa; see *Rudd v. Ray*, 248 N.W.2d 125 (Iowa 1976).

Patients at Broadlawns Medical Center are not required by the government to stay at the hospital, as a prisoner in a penal institution is required to stay. However, from a more realistic viewpoint, patients in a hospital are significantly limited in their mobility, at least for the period of time of their hospitalization, and are not truly able to leave at any time, so as to be able to freely accommodate their own individual religious beliefs and preferences. Likewise, to assume that family members of patients or staff of Broadlawns Medical Center have free and easy access to their own minister or counselor, at the critical times of need, is simply not realistic.

Broadlawns Medical Center treats indigents who have no other place to go, who may have no regular minister or their own, and who obviously have no hospital alternatives, and who, comparable to the veterans seeking medical services in facilities operated by the Veteran's Administration, should not have to choose between accepting medical treatment to which they are entitled or going elsewhere in order to freely exercise their chosen religion; see *Baz v. Walters,* supra, at 709.

Individuals have the constitutional right to exercise, freely, their own choice of spirituality or religion, even in the context of Broadlawns Medical Center. It is that very concept which provided the basis for Justice Douglas in *Zorach v. Clauson,* 343 U.S. 306 (1952), to state,

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government shows a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.
>
> 343 U.S. at 313-14.

The concurring opinion of Justice Brennan, in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), correctly expresses the ultimate, legal conclusion pertaining to the free exercise rights of patients at Broadlawns Medical Center:

> There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be * * *
>
> The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. * * *. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, * * *.
>
> 374 U.S. at 296-98.

The issue is not one as the Petitioners would characterize it of individuals compelling the government to provide a chaplain, but rather one of whether or not

Broadlawns Medical Center can accommodate the free exercise of rights of patients and family members. The Court of Appeals for the Eighth Circuit held, correctly, that Broadlawns Medical Center could, and that decision, on that issue should not provide the basis for the Court to grant the Petition for Writ of Certiorari.

CONCLUSION

The constitutional issues of import in this case were completely and correctly addressed by the Court of Appeals of the Eighth Circuit. Review by the Supreme Court of the United States is not necessary in this case for there to be a clear and accurate statement of the law concerning the application of the Establishment Clause to the facts in this case and the interrelationship of the Establishment Clause with the Free Exercise Clause. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES L. SAYRE
SAYRE & GRIBBLE, P.C.
718 Equitable Building
Des Moines, Iowa 50309
(515) 244-1437
Counsel for Respondents

APPENDIX

BROADLAWNS MEDICAL CENTER

Des Moines, Iowa

DEPARTMENT OF SOCIAL SERVICE

TITLE: CHAPLAIN SERVICES

DATE: December - 1985

APPROVED BY: Department of Social Services
Department of Nursing

DISTRIBUTION TO: Nursing Administration
Hospital Administration
Medical Education
Department of Psychiatry

PURPOSE: To provide consistent pastoral care throughout the Medical Center, adding spiritual support and counseling to the ongoing healing effort.

POLICIES:

A. Services provided by the hospital Chaplain:

1. Making preoperative calls whenever possible.

2. Upon referal

   a. visiting with critically ill and emotionally distressed patients and families, acknowledging and helping them to explore their feelings.

   b. visiting the terminally ill to provide a ministry of concern and support.

c. offering counseling for particular religious and emotional problems (making referrals to other professionals when indicated).

3. Performing sacraments of Communion and Baptism on request.

4. Providing counseling and spiritual support for Staff as requested and appropriate.

5. Participating in on-call coverage.

6. Weekdays, 8-4:30, being available for support of families at times of death and other crises (i.e. Code 99).

7. Acting as consultant to physicians, nursing staff and other care providers regarding problems, goals and other issues related to spiritual issues that may arise.

8. Contacting other clergy or religious groups at patient/family request.

9. Acting as corrdinator, recruitor and supervisor of Volunteer chaplains at BMC.

10. Coordinate and sometimes direct weekly interdenominational church services of approximately one half hour at 1:15 PM each Sunday in the Nauraine Conference Room, Sands Wing.

11. Chaplain may be contacted through the Social Service Department (or beeper) during regular work hours. The on-call Chaplain may be contacted through the Switchboard operator at other times.

B. Services performed by Volunteer Chaplains:

1. Visiting newly admitted patients to help them with the anxiety of illness and hospitalization and to orient them to the availability of a fulltime Chaplain.

2. Referring patients with ongoing spiritual/emotional needs to fulltime Chaplain.

3. Participating in on-call coverage and worship leadership.

4. When on-call, being available to patients, families and Staff at times of death and other crisis situations.

5. Performing related duties as required.

December, 1985